THE

INSOLVENT ACT OF 1875;

INCLUDING

FULL NOTES TO EACH SECTION,

TARIFF OF COSTS,

INDEX, AND LIST OF CASES.

BY

HUGH MACMAHON, ESQ.,

OF OSGOODE HALL, BARRISTER-AT-LAW.

(LONDON, ONTARIO.)

TORONTO:

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TO

THE HONOURABLE EDWARD BLAKE, Q.C.,

MINISTER OF JUSTICE

FOR THE DOMINION OF CANADA,

In Admiration

OF HIS EMINENT ABILITIES AS A JURIST,

AND

DISTINGUISHED CAREER

AS LEADER OF THE EQUITY BAR,

This Work is respectfully Dedicated.

PREFACE.

THE first Edition of the Insolvent Act of 1875 is presented in the hope it will merit that cordial reception which I was led to believe a work on the subject would meet with, not only from the Profession, but likewise from the Mercantile Community.

Every possible care has been exercised in annotating to give the latest Decisions of the English and Ontario Courts, and, in some cases of importance, full notes of the Decisions of the Courts of Quebec have been inserted.

Under some of the divisions—such as "Composition and Discharge," "Dividends," and "Frauds and Fraudulent Preferences"—the notes of Cases are numerous and full, so they will be of advantage not only to the Legal Profession, but also to the non-professional enquirer, who can understand therefrom the principles by which the Courts are guided in adjudicating upon the various questions which come before them under the Bankrupt Laws.

In the preparation of the Work, I have been greatly indebted to "Robson's Bankrupt Law," which I cannot too highly commend as a treatise on the principles of Bankruptcy. In some few instances, I have availed myself of the Notes to "Edgar's" and "Popham's" Insolvent Acts, to the Editors of which I am under many obligations.

The greatest care has been bestowed on the Index, which will be found unusually copious, while the List of Cases cited has received equal attention in its preparation.

Every precaution has been taken to ensure correctness; and an endeavour has been made, by careful annotations, to preserve the Work within moderate limits, so that it might be presented in a form which, it is hoped, will prove most generally useful.

I have to express my sincere obligations to GEORGE MCNAB, Esquire, Barrister-at-Law, for his careful co-operation in bringing out the present Work, and through whose assistance the usefulness of the present Volume has been much enhanced.

The Editor has to thank P. MULKERN and GEORGE E. MILLAR, Students-at-Law, for the care they have taken in the preparation of the Index and List of Cases.

H. MACMAHON.

LONDON, *August 27th*, 1875.

INTRODUCTION.

THE principle upon which the Law of Insolvency is founded is, that all an Insolvent's property belongs to his creditors, and should be distributed ratably amongst them; and that, on doing this, a debtor should be released from all liability arising from debts contracted prior to his insolvency, upon his complying with the requirements of the Statute.

The Bankrupt Law was first introduced into England by the Statute 34 & 35 Hen. 8, c. 4, which was directed against debtors, whether traders or not, who sought fraudulently to evade the payment of their debts. Since that time numerous Acts have been passed in Great Britain for the relief of insolvent debtors; but the Acts respecting bankrupts were expressly excepted from having any force in Canada when the laws of England were, by the 32 Geo. 3, c. 1, made the rule of decision in that Province.

The commercial transactions of the Dominion have grown so large, that the general feeling amongst the mercantile community is, that an Insolvent Law should remain as a permanent enactment on the Statute Book. It is, therefore, likely that, in accordance with the views of the commercial classes, as conveyed to the Legislature through the Dominion Board of Trade, an Insolvent Act will henceforward be recognised as a necessity in this country.

The Insolvent Act of 1869 gave general satisfaction in its working, as the machinery by which the Law was carried

into effect was simple, and, with some few exceptions, estates were wound up at small expense to the creditors. A very few amendments would have effected all that was desired, and rendered the Act of 1869 one of the easiest worked Bankrupt Laws enacted by any Legislature.

One of the amendments required to the Act of 1875 will be apparent on reading the case of Churcher *v.* Johnson, referred to in the Notes to Sect. 134, at page 205, and reported in 34 U. C. R., 528. Another amendment, much desired, is a provision preventing the barring of dower by a wife in her husband's lands from forming a valuable consideration between them for the conveyance by the husband to the wife of other lands then owned or afterwards acquired by the husband, so as to defeat the provisions of the Insolvent Act respecting voluntary conveyances.

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THE

INSOLVENT ACT OF 1875.

38 Vic., Cap. 16.

AN ACT RESPECTING INSOLVENCY.

[Assented to 8th April, 1875.]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:— Preamble

1. This Act shall apply to traders and to trading co-partnerships, and to trading companies whether incorporated or not, except Incorporated Banks, Insurance, Railway, and Telegraph Companies. Application of Act.

The following persons and partnerships or companies exercising like trades, callings or employments, shall be held to be traders within the meaning of this Act:— Who are traders under this Act.

Apothecaries, auctioneers, bankers, brokers, brickmakers, builders, carpenters, carriers, cattle or sheep salesmen, coach proprietors, dyers, fullers, keepers of inns, taverns, hotels, saloons or coffee houses, lime burners, livery stable keepers, market gardeners, millers, miners, packers, printers, quarrymen, share-brokers, shipowners, shipwrights, stockbrokers, stock-jobbers, victuallers, warehousemen, wharfingers, persons insuring ships or their freights or other

matters against perils of the sea, persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment or otherwise, in gross or by retail, and persons, who either for themselves, or as agents or factors for others, seek their living by buying and selling, or buying and letting for hire goods or commodities, or by the workmanship or the conversion of goods or commodities, or trees; but a farmer, grazier, common labourer, or workman for hire shall not, nor shall a member of any partnership, association or company which cannot be adjudged insolvent under this Act, be deemed as such, a trader for the purposes of this Act.

Proviso.

As to persons having been traders:

All such persons, co-partnerships, or companies, having been traders as aforesaid, and having incurred debts as such, which have not been barred by the statutes of limitations or prescribed, shall be held to be traders within the meaning of this Act; but no proceedings in liquidation shall be taken against such trader, based upon any debt or debts contracted after he has so ceased to trade.

Proviso.

The Insolvent Act of 1869 applied to trades only; and under it an inn-keeper was held not a trader (*Harman* vs. *Clarkson*, 22 U. C. C. P. 291). An inn-keeper has been made a trader under the Act of 1875, and this description has been held to include a lodging-house or boarding-house keeper (*Ex parte Bowers*, 3 M. & A. 33); or one who supplies provisions to his lodgers at a profit, and as a means of getting a livelihood (*Smith* vs. *Scott*, 9 Bing. 14; *King* vs. *Simmonds*, 1 H. L. Ca. 754; *Gibson* vs. *King*, 10 M. & W. 667; *Ex parte Daniel*, 7 Jur. 290).

A person may be a bankrupt as a banker, if he acts as one, although he does not keep an open shop or books as bankers usually do (*Ex parte Wilson*, 1 Atk. 217; *Richardson* vs. *Bradshaw*, *ib.* 129).

The term "Broker" has been held to include pawnbrokers (*Rawlinson*

vs. *Pearson*, 5 B. & Ald. 124) ; bill-brokers (*Ex parte Phipps*, 2 Dea. 487) ; assurance-brokers (*Ex parte Stevens*, 4 Mad. 256) ; and ship-brokers (*Pott* vs. *Turner*, 6 Bing. 702). A banker and exchange and money broker and a dealer in foreign and uncurrent money, and buying and selling stocks, a trader within the Act of 1869 (*Smart* vs. *Duncan*, U. C. Q. B. Not yet reported).

The above statutory declaration, as to who shall be considered traders, includes most of those likely to come within the appellation of traders or who are likely to claim the privileges accorded to traders under the Act.

A barber is not a trader ; even, although he sold perfumery, which was incidental to his business, and a purchase of tobacco nine months before his assignment which he sold again immediately, being an isolated transaction, was held insufficient to bring him within the Act (*Thomas* vs. *Hall*, 6 P. R. Com. Law Cham. 172).

In order to constitute a trading by buying and selling, the occupation must be followed as a means of gaining a livelihood ; one or two isolated transactions will not do. But if the trading is followed for a living, its extent or duration is immaterial (Robson 91 ; *Millikan* vs. *Brandon*, 1 C. & P. 380 ; *Parker* vs. *Barber*, 1 B. & B. 9 ; *Hankey* vs. *Jones*, Cowp. 745 ; *Ex parte Moule*, 14 Ves. 603 ; *Ex parte Bryant*, V. & B. 211 ; *Ex parte Lavender*, 4 D. & C. 487 ; *Ex parte Patterson*, 1 Rose, 402 ; *Patman* vs. *Vaughan*, 1 T. R. 572 ; *Ex parte Wilks*, 2 M. & A. 667 ; *Heane* vs. *Rogers*, B. & C. 578).

If a man buy horses to sell again, this constitutes a trading, but it does not if he sells only those bred by himself (*Ex parte Gibbs*, 2 Rose 38 ; *Wright* vs. *Bird*, 3 Camp. 233).

A person may be made bankrupt as a trader, although the trade he carries on is illegal, as where a man deals in smuggled goods (*Ex parte Meymot*, 1 Atk. 199 ; *Cobb* vs. *Symonds*, 1 D. & R. 111).

The 27th section of the Insolvent Act of 1865 does not enable the creditors of a deceased to put his executors or administrators into insolvency (*In re Sharpe*, 20 U. C. C. P. 82).

This clause expressly exempts farmers, graziers, common labourers and workmen for hire, from being as such adjudicated insolvents as traders.

The exemption merely extends to the occupation specifically mentioned, and will not protect a person from bankruptcy as a trader, who follows some other business within the statutory definition of trading. Thus a farmer who deals in cattle or other animals to a greater extent than can be fairly considered incidental to his farming will be deemed a trader (*Ex parte Gibbs*, 2 Rose 38; *Ex parte Hammond*, De . 93 ; *Ex parte Dering*, *ib.*

398 ; *Bell* vs. *Young*, 15 C. B. 524; *Ex parte Bowers*, 2 Dea. 99). So if he buys and sells farming produce, not grown on his farm with a view to profit, he will be a trader within the Act (*Mayo* vs. *Archer*, 1 Str. 514). If in fact he buys and sells animals and commodities, not merely as an auxiliary to his farming business, but as a means of making a living thereby, independently of his farm, he will be a trader (Robson, 2 Ed. 101).

A man once a trader is liable to the bankrupt laws until all his debts are paid, whether contracted during the time of trading or before that time and in no way connected with his trading (*Ex parte Dewney*, 15 Ves. 495 ; *Ex parte Burnford*, 15 Ves. ; *Doe d. Barrad* vs. *Lawrence*, 2 Car. P. 134 ; *Bailie* vs. *Grant*, 9 Bing. 121 ; 2 M. & S. 163 ; 6 Bligh, 459, appealed to the House of Lords).

A trader who has ceased to trade before the 1st September 1864, cannot be proceeded against under that Act (*Bagnell* vs. *Hamilton*, 10 U. C. L. J., 305).

By the above section no proceedings in liquidation shall be taken against any trader based upon any debt or debts contracted after he has ceased to trade.

An infant being legally incapable to contract except for necessaries, cannot be made bankrupt unless it be for debts so contracted, which it would seem he may if the principle be correct that liability to bankruptcy is commensurate with that of being sued (*Ex parte Adans*, 1 V. & B., 493 ; *O'Brien* vs. *Currie*, 3 Car. & P. 283 ; Lord Raymond's Report 443 ; *Ex parte Watson*, 16 Ves. 265 ; *Ex parte Moule*, 14 Ves. 603).

If a person on attaining his majority confirms debts contracted during infancy, he may be adjudged bankrupt in respect of it (*Belton* vs. *Hodges* 9 Bing. 369). So also a debt contracted under a representation that he was of age may be proved against him after he attains his majority (*Ex parte Unity Bank*, 3 De. G. & J. 68 ; 4 Jur. N. S. 470, 1257) ; and if an infant be made a bankrupt upon a debt contracted upon a false representation that he was of age, that would be ground to refuse an application by him to annul the bankruptcy (*Ex parte Watson*, 16 Ves. 265 ; *Ex parte Bates* 2 M. D. & D., 337).

A lunatic, provided the act of bankruptcy be committed during a lucid interval, may be proceeded against (*Ex parte Priddy*, Cook 48 ; *anon.* 13 Ves. 590 ; *Ex parte Stamp*, 1 De. & G. 345).

A married woman comes within the Act if liable to be sued to execu-

tion for debts contracted during coverture. The 9th section of 35 Vict. Chapt. 16, subjects her to be sued or proceeded against separately from the husband in respect of any of her separate debts, contracts or torts, as if she were unmarried. It would therefore seem that she is now liable to the bankrupt laws if she trades in respect of her separate estate (*Merrick* vs. *Sherwood*, 22 U. C. C. P., 467. ; *Steels* vs. *Hullman*,33 U. C. Q. B., 471).

Remarks as to the meaning of the term Insolvent (*Sutherland* vs. *Nixon*, 21 Q. B. 629 ; *Hersee* vs. *White*, 29 Q. B., 232).

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2. The word "county" shall mean a county or union of counties, and the word "district" shall mean a district as defined for judicial purposes by the Legislature of the Province wherein the same is situate. Interpretation: County, District.

a. "Official Assignee" shall mean the person or persons appointed by the Governor in Council as hereinafter provided, to act as Assignee or Joint Assignee under this Act in any County or District. —"Assignee" shall mean either the Official Assignee or the Assignee appointed by the creditors, as the context may require. Official Assignee. Assignee.

Under the former Acts Official Assignees were appointed by the Boards of Trade, now the appointments of Assignees are in the hands of the Governor-General.

Under the Insolvent Act of 1869, Sect. 2, an Insolvent was permitted to make a voluntary assignment, and it was held that such assignments were not valid unless accepted by the Assignee (*Yarrington* vs. *Lyon*, 12 Grant 308 ; *Becher* vs. *Blackburn*, 23 U. C. C. P. 207).

Under Sec. 9 *infra*, the Writ of Attachment must issue from the County in which the trader has his chief place of business, and must be directed to the Assignee of such County.

b. "Official Gazette" shall mean the Gazette published under the authority of the Government of Official Gazette.

the Province where the proceedings in Bankruptcy or Insolvency are carried on, or used as the official means of communication between the Lieutenant-Governor and the people, and if no such Gazette is published, then it shall mean any newspaper published in the County, District or Province, which shall be designated by the Court or Judge for publishing the notices required by this Act.

Court. *c.* The word "Court" shall mean the Superior Court in the Province of Quebec, the Court of Queen's Bench in the Province of Manitoba, and the County Courts in the Provinces of Ontario, New Brunswick, British Columbia, and Prince Edward Island, and also in Nova Scotia, whenever County Courts shall have been established in that Province, and until such County Courts are established it shall mean the Court of Probate of that Province.

Judge. *d.* The word "Judge" shall mean a Judge of the said Courts respectively, having jurisdiction in the County or District where proceedings shall be had under this Act, and shall also include a Junior and Deputy Judge when such are appointed.

Debtor. *e.* The word "Debtor" shall mean any person or persons, co-partnership, company or corporation having liabilities, and being subject to the provisions of this Act.

Insolvent. *f.* The word "Insolvent" shall mean a debtor subject to the provisions of this Act unable to meet his engagements, or who shall have made an assignment of his estate for the benefit of his creditors.

Notary. *g.* The words "before Notaries" or "before a Notary," shall mean executed in notarial form, according to the laws of the Province of Quebec.

h. The word "Creditor" shall mean every person, co-partnership or company to whom the Insolvent is liable, whether primarily or secondarily, and whether as principal or surety;—but, in reference to proceedings at meetings in Insolvency, to the right of voting, to the execution of a deed of composition and discharge, the consent to a discharge of an Insolvent, or any other consent or action with regard to the management and disposal of the estate of an Insolvent, the word "Creditor" shall mean a person, co-partnership or company whose unsecured claims, to an amount of one hundred dollars or upwards, have been proved in the manner provided by this Act, and the proportion of claims in value required to give validity to any such proceeding or action shall be formed of all claims so proved, whether above or under one hundred dollars, and of no others; and with regard to any deed of composition and discharge, or the consent to a discharge of the Insolvent, no creditor whose claim is not affected by such discharge shall be reckoned as one of the required number of creditors, nor shall his claim be reckoned as forming part of the proportion of claims required to give effect to such composition and discharge. For all the purposes of this Act the required amount of the creditor's claim shall be over and above any set-off or counter-claim of the debtor against such creditor; and every affidavit of indebtedness made by any creditor shall be construed as made in this sense.

Creditor.

As to voting, composition, &c.

As to creditors not affected by composition, &c.

i. The word "collocated" shall mean ranked or placed in the dividend sheet for some dividend or sum of money.

Collocated.

j. In the case of any partnership or any company,

Partner-

ships and companies

incorporate or not, the word "he," "him," or "his," used in relation to any Insolvent or Creditor, shall mean "the partnership," or "the company," or "of the partnership," or "of the company" (as the case may be), unless the context requires another interpretation to give such effect as the purposes of this Act require, to the provision in which the word occurs.

Acts of insolvency

3. A debtor shall be deemed insolvent—

Acknowledging insolvency

a. If he has called a meeting of his creditors for the purpose of compounding with them, or if he has exhibited a statement showing his inability to meet his liabilities, or if he has otherwise acknowledged his insolvency.

This sub-section (*a*) is new and was absolutely required for the proper working of the Act.

Absconding.

b. If he absconds or is immediately about to abscond from any province in Canada with intent to defraud any creditor, or to defeat or delay the remedy of any creditor, or to avoid being arrested or served with legal process; or if, being out of any such Province in Canada, he so remains with a like intent; or if he conceals himself within the limits of Canada with a like intent;

If the debtor goes abroad for a proper purpose, and his creditors are not thereby delayed, it will not be an act of bankruptcy (*Ex parte Mutrie*, 5 Ves. 576; *Ex parte Osborne*, 2 V.& B. 177; 1 Rose, 387; *Windham* vs. *Patterson*, 2 Rose 466; 4 Camp. 289).

But the lawfulness of the purpose will not prevent his departure from being an act of bankruptcy, if the necessary consequence is to delay creditors, as if, being a trader, he omits to make provision for the payment of bills becoming due (*Ex parte Kildner*, 2 Dea. 324; 3 M. & A. 722;

Windham vs. *Patterson*, supra; *Holyrood* vs. *Whitehead*, 2 Rose, 145; *Ramsbottom vs. Lewis*, 1 Camp. 279; *Ex parte Bunney*, De G. & J. 309).

So also the being pressed with debts is strong evidence that the departure was with intent to delay creditors (*Williams* vs. *Nunn*, 1 Taunt. 270; *Ex parte Osborne*, supra; *Robson* vs. *Rolls*, 9 Bing. 648).

If the intent of delay is established, it is immaterial that no creditor is actually delayed (*Holyrood* vs. *Whitehead*, supra; *Hammond* vs. *Hicks*, 5 Esp. 139; *Hallen* vs. *Homer*, 1 C. & P. 108). And the Act of Bankruptcy will be complete at the moment of departure (*Ex parte Gardner*, 1 V. & B. 45).

It is held that a person going abroad for a legitimate purpose, and remaining abroad without making any provision for the payment of his debts, or sending money for that purpose, is remaining abroad with intent to delay his creditors, although he constantly stated in his letters his intention to come home in a month or six weeks, but fixed no definite time (*Ex parte Cohn*, 2 L. T. [N. S.] 90 Bank).

If intent to delay creditors can be proved either in departure from the country or in remaining abroad, or can be inferred as the necessary and foreseen consequence of the delay actually produced, an act of bankruptcy will be proved (Eden, B. L. 16).

A petition cannot be sustained by proof of residence abroad, when the departure was for a fair and proper purpose, and not with a view of defrauding creditors; but it is otherwise if the apprehension of arrest is coupled with a justifiable motive (*Warner* vs. *Barber*, Holt, 175.)

If a trader goes abroad for a proper object and stays for an unreasonable time, assigning no cause for his absence, and leaving no funds nor making any arrangements for the payment of his debts, the inference will be that he remains abroad with intent to delay his creditors (*Cumming* vs. *Bailey*, 6 Bing. 370).

c. Or if he secretes or is immediately about to secrete any part of his estate and effects with intent to defraud his creditors, or to defeat or delay their demands or any of them; Secreting effects.

d. Or if he assigns, removes or disposes of, or is about or attempts to assign, remove or dispose of, any of his property with intent to defraud, defeat, or delay his creditors, or any of them; Fraudulently assigning.

The mere intention on the part of a debtor to dispose of his property and the apprehension of his said creditors that he will not then, although perfectly able and owing no one else, pay the creditors, does not bring the debtors within sub-section C (*Sharp et al* vs. *Matthews*, 5 P. R. 10. Cham).

A delivery of goods and chattels will not be an act of bankruptcy unless the property in them is changed (*Cole* vs. *Davies*, 1 L. Raymond ; *Isett* vs. *Beetson*, L. R., 4 Ex. 159; *Cotton* vs. *James*, 1 Moo. & M. 273).

What will amount to a "fraudulent intent," or an attempt to "defeat or delay" the demands of creditors, will depend on the circumstances of each particular case, but it is not necessary that the "fraudulent intent" should be actually proved ; it is sufficient if the circumstances are such as to warrant the inference of fraud. If the necessary consequence of the debtor's acts be that his creditors must be thereby defrauded, defeated or delayed this is presumptive evidence of his intention to do so (*Ramsbottom* vs. *Lewis*, 1 Camp. 279 ; *Holroyd* vs. *Whitehead*, 3 Camp. 530 ; *Ex parte Kilner*, 2 Dea. 325). The presumption raised by circumstances attending the act may be rebutted by evidence that the debtor did not at the time entertain the intention imputed to him. For instance he may prove that on leaving the county he left a partner behind him (*Ramsbottom* vs. *Lewis*, ubi supra) ; or that his presence out of the Province was absolutely necessary in order to look after his concerns there (*Ex parte Mutrice*, 5 Ves. 576 ; *Warner* vs. *Barber*, 1 Holt 175) ; or that previous to his departure he made arrangements by which the interests of his creditors should be attended to in his absence (*Ramsbottom* vs. *Lewis*, ubi supra ; and see *Windham* vs. *Patterson*, 1 Stark 144).

"It has long been settled that an assignment by a trader of the whole of his property in trust for all his creditors, is an act of bankruptcy. It may be regarded as a declaration or admission of insolvency, and a trader who executes such a deed necessarily deprives himself of the power of carrying on his trade, besides it is putting his property under a different course of distribution from that which would take place under the Insolvent Act, and invests persons of his own choice with the administration thereof, instead of persons chosen by his creditors (Robson, 2nd Ed. 117 ; *Dutton* vs. *Morrison*, 17 Ves. 199 ; *Lindon* vs. *Sharp*, 6 M. & G. 895 ; *Topping* vs. *Keysell*, 16 C. B. N. S. 258 ; *Worsley* vs. *De Mattos*, 1 Burr. 467) ; and see notes to Sections 130, 131, 132 and 133.

Conniving seizure. Or if with such intent he has procured his money, goods, chattels, lands or property to be

seized, levied on or taken under or by any process or execution, having operation where the debtor resides or has property, founded upon a demand in its nature provable under this Act, and for a sum exceeding two hundred dollars, and if such process is in force and not discharged by payment or in any manner provided for by law.

Refraining from entering an appearance to an action by a creditor on a specially endorsed writ, whereby he obtained judgment and priority over other creditors, is not in itself a procuring of goods, &c., or taken in execution within the meaning of the Act, but it is open to the creditors to satisfy the Judge that the taking in execution was through the procurement of the insolvent (*Worthington* vs. *Hamilton*, 10 U. C. L. Journal, 304).

An act of bankruptcy by procuring goods to be taken in execution is not committed until actual seizure, and when so committed is not carried back by relation to an earlier period. (*Belcher* vs. *Gunmow*, 11 Jur. 286; *Gibson* vs. *King*, 1 Car. & M. 458).

The 67 section of the English Act of 1861 is similar to the above, and it was held under that section that "procuring" means taking the initiative causing the thing to be done in the ordinary sense of the word. There must be in the act an intent to delay or defraud the creditors. Where there was an honest and proper motive on the part of the debtor in granting a judgment, no act of bankruptcy is committed (*Gore* vs. *Lloyd*, 13 L. J. 366, Exch).

For American decisions, see *Avery* vs. *Hobbs*, Bank Law, U.S. 335; James' Bank Law, 1867, 260.

Being imprisoned.

f. Or if he has been actually imprisoned or upon the gaol limits for more than thirty days, in a civil action founded on contract for the sum of two hundred dollars or upwards, and still is so imprisoned or on the limits; or if, in case of such imprisonment, he has escaped out of prison, or from custody, or from the limits;

Making default to appear.

g. Or if he wilfully neglects or refuses to appear, on any rule or order requiring his appearance, to be

examined as to his debts under any statute or law in that behalf;

Disobeying rule.

h. Or if he wilfully refuses or neglects to obey or comply with any such rule or order made for payment of his debts or of any part of them;

Or decree, &c.

i. Or if he wilfully neglects or refuses to obey or comply with an order or decree of the Court of Chancery or of any of the judges thereof, for payment of money.

Making assignment otherwise than under this Act, &c.

j. Or if he has made any general conveyance or assignment of his property for the benefit of his creditors, otherwise than in the manner prescribed by this Act; or if, being unable to meet his liabilities in full, he makes any sale or conveyance of the whole or the main part of his stock in trade or of his assets, without the consent of his creditors, or without satisfying their claims.

An assignment for the benefit of creditors not made in accordance with the Act is an act of insolvency, and void as against an execution creditor or the Official Assignee appointed in compulsory proceeding under the Act after such proceedings are taken if finally sustained (*Wilson* vs. *Cramp*, 11 Grant 444, approved of; *Thorne* vs. *Torrance*, 16 C. P. 445, affirmed in appeal 18 C. P. 29).

Such proceedings render the assignment absolutely void as against creditors of the insolvent, so as to let in intermediate execution creditors (S. C. 16 C. P. 445).

One of two partners, a few days before an attachment against both, under the Act of 1864, had issued, assigned his estate for the benefit of his creditors. Held void as against the official assignee (*Wilson* vs. *Stephenson*, 12 Grant 239).

If the deed is delivered by the debtor merely as an escrow, it will not be an act of bankruptcy (*Botcherby* vs. *Lancaster*, 1 Ad. & E. 77; *Pulling & Tucker*, 4 B. & Ald. 382).

The only creditors who will be in a position to take advantage of this act of bankruptcy are those who have not signed or become parties to

the deed of assignment for the benefit of creditors (*Re* a disputed adjudication, 2 L. T. N. S. 90 Bank).

If a debtor execute a deed of assignment to trustees for the benefit of creditors, he commits an act of bankruptcy, although the trustees do not assent thereto and refuse to execute the deed (*Ex parte Slann*, 6 L. T. N. S. 400). Held that this section does not apply to assignments made before 1st of September, 1864.

An assignment made by a trader by way of mortgage of his stock and implements of trade, where such assignment does not convey one-half of estate is not *per se* an act of bankruptcy, though his business may be stopped thereby (*Young* vs. *Wand*, 8 Exch. Rep. 221).

This Act of Bankruptcy mentioned in this and preceding clauses can only be taken advantage of, to place an estate in compulsory liquidation, within three months after the assignment has been made See section, 8 infra.

An assignment intended to be made under the voluntary clauses of this Act, might from some entire omission of a prescribed proceeding, be an act of bankruptcy under this section ; and see notes to sub-sections B. & C. of this section, and notes to sections 130, 131, 132 and 133.

k. Or if he permits any execution issued against him under which any of his chattels, land or property are seized, levied upon or taken in execution, to remain unsatisfied till within four days of the time fixed by the Sheriff or officer for the sale thereof, or for fifteen days after such seizure; subject however, to the privileged claim of the seizing creditor for the costs of such execution, and also to his claim for the costs of the judgment under which such execution has issued, which shall constitute a lien upon the effects seized, or shall not do so, according to the law as it existed previous to the passing of this Act, in the Province in which the execution shall issue.

Allowing execution to be unsatisfied.

Proviso as to costs.

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4. If a debtor ceases to meet his liabilities generally as they become due, any one or more of his

When creditors may demand

an assignment.

creditors for unsecured claims of not less than one hundred dollars each, and amounting in the aggregate to five hundred dollars, may make a demand upon him either personally or at his chief place of business, or at his domicile, upon some grown up person of his family or in his employ (Form A.), requiring him to make an assignment of his estate and effects for the benefit of his creditors. But the said demand shall not be made until the creditor or creditors making the same shall have filed with the clerk or prothonotary of the court, in which the proceedings in liquidation (if any) will be carried on, his or their affidavit verifying his or their debt or debts, and that he or they is not or are not acting in collusion with the debtor, or to procure him any undue advantage against his creditors.

Form.

Affidavit required.

Creditors demanding assignment must elect a domicile.

The creditor or creditors making such demand of assignment shall in such demand elect and appoint a domicile or domiciles, respectively, within the district or county in which such affidavit is filed, at which service of any answer, notice or proceeding may be served on him or them; and the said clerk or prothonotary shall keep the original and give a certified copy to the creditor or creditors; and such copy shall be annexed to the notice served on the debtor.

As to who is a "Creditor," see *Moore* vs. *Luce*, 18 U. C. C. P., 446. If a surety has actually paid money for his principal, he is a "creditor," and can make the demand (*Ex parte Rogers*, D. & C., 623); but it is otherwise, if he is under a mere liability to pay (*Garratt* vs. *Austin*, 4 Taunt. 200). A debt tainted with fraud or founded on an illegal consideration, will not support a demand, so as to put a debtor into compulsory liquidation (*Wells* vs. *Girling*, 1 B. & B., 447).

A creditor whose debt is not yet due may proceed against his debtor

who is insolvent, as he might have done if his debt had been overdue. But in this case, it appearing that the debtor did not owe more than $100 beyond this debt, none of which was at the time due, and a portion not payable for several years, the Court directed that he should be allowed further time, to shew, if he could, that he was not in fact insolvent, and so not liable to have his estate placed in compulsory liquidation (*In re Moore* vs. *Luce*, 18 C. P. 446).

A trader having ceased to meet his liabilities a demand was served upon him on 31st January, 1865, requiring him to make an assignment. On 6th February—the 5th being on Sunday—an order was granted for an attachment which issued. One of the affidavits filed on application for attachment was sworn to on 4th February. On an application to set aside the Writ and all proceedings for irregularity, it was held

1. That the order for the issuing of the Writ was not made too soon.

2. That it was immaterial that one of the affidavits was made within the five days allowed for petitioning under sub-Sec. 3, or making an assignment in accordance with the demand.

3. That the attachment should have been endorsed with a statement that the same was issued by order of the Judge of the County Court, but an amendment was allowed on payment of costs by the plaintiff.

4. Objections that the affidavit of two credible witnesses was not filed at the time of issuing attachment, that the proceedings were not taken three months, &c., and that sufficient time was not left to give notices required by the Act for taking proceedings under a voluntary assignment were overruled (*McInnis* vs. *Brooks*, 1 L. J. N. S. 162).

The clauses of the above section requiring a creditor to file an affidavit with the Clerk or Prothonotary verifying his debt and negativing collusion with the debtor before a demand can be made is new. The affidavit required to be made and filed with the Clerk or Prothonotary may be "made by the party interested, his agent or other party having a personal knowledge of the matters therein stated." See Sect. 105.

A certified copy of the affidavit filed with the Clerk or Prothonotary must be obtained and annexed to the demand before the same is served on the debtor.

The clause requiring a domicile to be appointed by the creditor in the county where such demand is served, at which papers may be left for service on him is new.

For form of affidavit verifying debt and form of demand with notice of domicile, see Forms Nos. 1 & 2.

Judge may annul demand if claims do not amount to $500, &c.

5. If the debtor, on whom such demand is made, contends that the same was not made in conformity with this Act, or that the claims of such creditor or creditors do not amount to one hundred dollars each, or to five hundred dollars in the aggregate, or that they were procured in whole or in part for the purpose of enabling such creditor or creditors to take proceedings under this Act, or that the stoppage of payment by such debtor was only temporary, and that it was not caused by any fraud or fraudulent intent, or by the insufficiency of the assets of such debtor to meet his liabilities, he may, after notice to such creditor or creditors, but only within five days from such demand, present a petition to the judge, praying that no further proceedings under this Act may be taken upon such demand, and, after hearing the parties and such evidence as may be adduced before him, the judge may grant or reject the prayer of his petition, with or without costs against either party; but if it appears to the judge that such demand has been made without reasonable grounds, and merely as a means of enforcing payment under colour of proceeding under this Act, he may condemn the creditor or creditors making it, to pay treble costs.

Or if stoppage be only temporary.

Proviso: as to costs.

This section is a re-enactment of the 15th section of the Act of 1869. Under this section it would appear that before the debtor could bring an action, it would be necessary for him to present the required petition to the Judge, and all the Judge is empowered to do is to award treble costs, should the petition be substantiated. Under the English Act, the Court is authorised to award damages for injury sustained by a malicious or unfounded petition.

It is presumed, however, that the fact of the Judge having awarded treble costs, would not prevent the creditors from being liable on an action against them for damages, for maliciously abusing the provisions of

the Act. The Court cannot allow the petition to be presented after the five days, even when it has been alleged that the neglect arose through an error on the part of the defendant's attorney, and that the defendant had a good defence (*May* vs. *Larue*, 10 L. C. Jurist, 113).

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6. If at the time of such demand the debtor was absent from the Province wherein such service was made, application may be made after due notice to the creditor or creditors, within the said period of five days, to the judge on his behalf, for an enlargement of the time for either contesting such demand or for making an assignment; and thereupon, if such debtor has not returned to such Province, the judge may make an order enlarging such period and fixing the delay within which such contestation or assignment shall be made; but such enlargement of time may be refused by the judge if it be made to appear to his satisfaction, that the same would be prejudicial to the interest of the creditors. Judge may enlarge time for contestation or assignment. Proviso

This is a re-enactment of the 16th section of the Act of 1869, with the exception that under the above section, the debtor can obtain an enlargement of the time for contesting the creditors' demand, as well as for making an assignment.

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7. If such petition be rejected, or if, while such petition is pending, the debtor, without the leave of the judge or otherwise than on the terms prescribed by him, continues his trade, or proceeds with the realization of his assets, or if no such petition be presented within the aforesaid time, and the debtor during the same time neglects to make an assignment of his estate and effects for the benefit of his When debtor's estate to become subject to liquidation.

creditors, as hereinafter provided, his estate shall become subject to liquidation under this Act.

This section is similar the 17th section of the Act of 1869, except that that section does not contain the words, "*without the leave of the Judge or otherwise than on the terms prescribed by him.*"

Time for commencing proceedings limited.

8. No such proceedings as aforesaid shall be taken under this Act to place the estate of an insolvent in liquidation, unless the same are taken within three months next after the act or omission relied upon as subjecting such estate thereto; nor after a writ of attachment in liquidation has been issued while it remains in force; nor after an assignment has been made under this Act.

Under the old bankrupt laws in England a man might be made a bankrupt as a trader after he had ceased to trade in respect of a debt contracted or subsisting during the trading (*Butcher* vs. *Easto*. 1 Dang. 295; *Bailie* vs. *Grant*, 9 Bing 121; *Maggot* vs. *Mills*, 1 L. Raym. 286); and the act of bankruptcy might be committed after the trading had ceased (*Ex parte Bamford*, 15 Ves. 453; *Bailie* vs. *Grant*, *supra*; *Ex parte Griffiths*, 3 D. M. & G. 174; *Ex parte Adams*. 3 De G. & J. 70). It has been held that the English Bankrupt Act of 1869 has not a retrospective effect and that a man cannot be made a bankrupt as a trader unless he was a trader at the commencement of the Act or became one subsequently (*Ex parte Bailey*, L. R., 13 Eq. 314.) As to what amounts to a ceasing from trading see (*Ex parte Paterson*, 1 Rose, 402; *Ex parte Candy*, 216, 357; *Rawlinson* vs. *Pearson*, 5 B. & Ald. 124; *Robson*, 2 Ed. 100).

Although this section provides that proceedings must be taken within three months after the act or omission relied upon, it should be remarked that as to the second act of bankruptcy mentioned in section three, it may be a continuing one—*de die in diem*; for any one remaining abroad or concealing himself within the Province with intent to defeat or delay his creditors, commits a continuous act of bankruptcy until he comes back or discovers himself. It is probable that the acts of negligence in section three, marked g. h. and i., are continuous acts of bankruptcy as long as

he debtor neglects to comply with the rules or orders therein mentioned (Edgar, Ed. of 1869, p. 54.)

WRITS OF ATTACHMENT, ETC.

Affidavits by parties demanding Writ

9. Any creditor upon his affidavit, or that of his clerk, or other duly authorized agent, that a trader is indebted to him in a sum provable in insolvency of not less than two hundred dollars, over and above the value of any security which he holds for the same, and provided the affidavit or affidavits filed disclose such facts and circumstances as will satisfy the Judge or Prothonotary of the Superior or County Court, in the county, province, or district, as the case may be, in which such trader has his chief or one of his principal places of business, that such trader is insolvent, and that his estate has become subject to liquidation under the provisions of this Act, and that he does not act in the premises in collusion with such trader, nor to procure him any undue advantage against his creditors, (Form B) shall be entitled to a writ of attachment (Form C) against the estate and effects of such trader, addressed to the Official Assignee of the county or district in which such writ shall issue, requiring such Official Assignee to seize and attach the estate and effects of such trader, and to summon him to appear before the court or a judge thereof on a day therein mentioned, to answer the premises. Concurrent writs of attachment may be issued when required, addressed to the Official Assignee of other counties or districts in any part of the Dominion other than the county or district in which the same shall be issued. Such writs shall be subject as nearly as can be to

Writ of Attachment.

Form.

Concurren Writs.

Forms of proceeding

the rules of procedure of the court in ordinary suits, as to their issue and return, and as to all proceedings subsequent thereto before any court or judge.

This section covers the same ground as the 19th and 20th sections of the Act of 1869, and directs that the attachments be issued to the assignee instead of the sheriff, as provided by the Act of 1869. The 20th section of the Act of 1869 required two credible persons to prove facts as to insolvency ; the above section only requires the affidavit of the creditor, his clerk, or duly authorized agent. Hence it is not necessary to refer to the decisions as to the number of persons relied upon to constitute the acts of insolvency. Under the Act of 1869, it was held that the form of affidavit (F) should be followed (*Sharp* vs. *Matthews*, 5 P. R. 10 Chamb). But see sec. 49 of the Administration of Justice Act of 1873, Ont.. Where a trader in Ont. becomes insolvent, and an attachment in insolvency is issued to the Sheriff of the county in which he resides, the County Judge can issue another attachment to the Sheriff of any county in Ont., or of any district in Quebec in which the insolvent has property (*Re Beard.* 15 Grant, 441.) For the meaning of the word "creditor" see notes to sec. 4.

In an action for maliciously issuing an attachment, the fact of the affidavit of the defendant's agent, as to the removal of the goods, not being corroborated by two witnesses as required by the Act, is not sufficient of itself to support the action (*Eaton* vs. *the Gore Bank*, 27 Q. B. U. C., 490). When one petitioning creditor applies and fails to proceed, it is not competent for another creditor to apply for adjudication on that petition (*In re Bristow*, 3 L. R. Chy. 247). A limited company can maintain a petition in bankruptcy for an adjudication, and the secretary of the company can make the necessary affidavit (*In re Calthorp*, 3 L. R. Chy. 252). There seems to be no reason why application might not be made for a writ of attachment against a person who has already taken the benefit of the Act for the Relief of Insolvent Debtors, C. S. U. C. Ch. 26 (*Jellis* vs. *Mountford*, 4 B. & A. 256). The obligation to pay a sum of money under an order of a court of equity, although placed for some purposes on the same footing as a judgment at law, is not a sufficient petitioning creditors' debt (*Ex parte Blencowe.* 1 L. J. Ch. 393). But as the equitable debt can now be sued for at common law under Administration of Justice Act, 1873, Ont., it is presumed it would be sufficient. By the English Bankrupt Act of 1869, a sum due either at law or in equity, provided it is a liquidated sum, will support a petition for adjudication. The debt must be a liquidated sum—that is, a sum certain in amount, or the amount of which is

capable of being ascertained without the intervention of a jury (*Ex parte Charles*, Ves. 256; *ex parte Broadhurst*, 2 D. M. & G. 953). And if the interest be recoverable only as damages as when it is not contracted for, it cannot be added to the principal to make up the requisite amount (*Ex parte Greenway*, Buck. 412, *Cameron* vs. *Smith*, 2 B. & Ald. 305.) Debts barred by the statute of limitations will not be a good petitioning creditors' claim (*Mavor* vs. *Payne*, 3 Bing. 286; *Middleton* vs. *Mucklow*, 10 *ib.* 401.) Nor will a debt founded upon an illegal consideration (*Wells* vs. *Girling*, 1 Brod. & B. 447).

A creditor whose debt has not matured may commence proceedings against his debtor who is insolvent in like manner as he might have done if his debt had been due at the time. But where it appeared that the debtor did not owe over $100.00 beyond the creditor's debt, none of which was at the time due, the Court directed that he should be allowed further time to show, if he could, that he was not in fact insolvent, and so not liable to have his estate placed in compulsory liquidation (*Moore* vs. *Luce*, 18 C. P. U. C. 446).

Service of writ, how made.

10. The service of a writ of attachment issued against a debtor under this Act, may be made upon him as provided for the service of an ordinary writ of summons in the Province where the service is to be made, and if such debtor remains without such Province, or conceals himself within such Province or has no domicile in any Province of the Dominion, or absconds from his domicile, in every such case service shall be made by such notice or advertisement as the judge, or in the Province of Quebec the judge or prothonotary, may order.

And of Concurrent Writs

Concurrent writs of attachment issued against a debtor may be executed without being previously served upon him, except in cases where such debtor has his domicile or a place of business in the county or district in which the same is to be executed, when the writ may be served at such domicile or place of business.

The writ of summons in Ontario may be served in any county "and the service thereof, whenever practicable, shall be personal"; C. L. Pro. Act Sect. 16.

When personal service cannot be effected, three things should be shown before an order for substitutional service will be granted:—1st. That reasonable efforts have been made to effect personal service; and 2nd, that the writ has come to the knowledge of the defendant; 3, or that he wilfully evades service of the same.

As to what will be considered reasonable efforts to effect service, as to writ coming to defendant's knowledge, and as to defendant's keeping out of the way to avoid service *vide* Harrison's C. L. Pro. Act, 2nd Ed., p. 19, *note* (*x.*) where numerous authorities are cited.

Time for Return of Writ. Notice of issue.

11. Writs of attachment shall be made returnable forthwith after the execution thereof. And immediately upon the receipt of a writ of attachment issued under this Act, the Official Assignee shall give notice of the issuing thereof by advertisement (Form D.)

Duty of Assignee executing Writ.

12. The Official Assignee by himself or by such Deputy (which word shall in this Act include Deputies,) as he may appoint shall, under such writ of attachment, seize and attach all the estate, property and effects of the Insolvent, within the limits of the county or district for which he is appointed, including his books of accounts, moneys, securities for moneys, and all his office or business papers, documents, and vouchers of every kind and description; and shall return with the writ a report under oath stating in general terms his proceedings on such writ.

The 22nd Section of the Act of 1869 provides that writs of attachment shall not be returnable in less than three days, and the time for such

return to be fixed by the distance of the place of residence of the insolvent from the place of return. Under Section 23 of the Act of 1869, the Sheriff was the officer appointed to execute the writ of attachment, which duty now devolves upon the Assignee.

Assignee may break open house, &c.

13. If the Official Assignee or his Deputy, is unable to obtain access to the interior of the house, shop, store, warehouse or other premises of the Insolvent named in the writ, by reason of the same being locked, barred, or fastened, such Official Assignee or Deputy is hereby authorized forcibly to open the same in the presence of at least one witness, and to attach the property found therein.

Under Section 24 of Act of 1869, the sheriff who was entrusted with the execution of the writ of attachment was not obliged when forcing an entrance into premises, to do so in the presence of a witness; but the above section makes it obligatory on the assignee when forcing an entrance for the purpose of attaching property, to do so in the presence of at least one witness.

ASSIGNMENTS AND PROCEEDINGS THEREON.

Assignment, when and to whom it may be made, &c.

14. A debtor on whom a demand is made by a creditor or creditors who has or have filed the affidavit required, or against whom a writ of attachment has issued, as provided by this Act, may make an assignment of his estate to the Official Assignee appointed for the county or district wherein he has his domicile, or wherein he has his chief place of business, if he does not reside in the county or district wherein he carries on his bsuiness; and in case there is no Official Assignee in the county or district where he resides or wherein he carries on his business, then to the Official Assignee for the

nearest adjoining county or district; but such assignment or writ of attachment may be set aside or annulled by the court or judge for want of, or for a substantial insufficiency in, the affidavit required by section four, or by section nine, on summary petition of any creditor to the amount of not less than one hundred dollars beyond the amount of any security which he holds—of which petition notice shall have been given to the debtor and to the creditor who made the demand of assignment or who issued the writ of attachment, within eight days from the publication of the notice thereof in the Official Gazette.

This section is new and materially differs from the 2nd section of the Act of 1869, which provided that any debtor unable to meet his engagements, and desirous of making an assignment might do so.

The above section gives any creditor for a sum over $100 the privilege to petition to have the assignment or writ of attachment set aside or annulled, a power which was not extended to creditors previous to this act. See notes to sub-sec. *a*, sec. 2.

Held following: *Kingston* vs. *Campbell* 2 L. J. N. S. 299; and *White* vs. *Cuthbertson*, 17 C. P. 377, that a voluntary assignment to an official assignee must be to one resident in the county within which the Insolvent has his place of business. But *semble* that the creditors may acquiesce in an assignment to a non-resident official assignee, and thus constitute him their assignee. Defendant's execution was handed to the sheriff on the 28th of June, the assignment to the plaintiff made on the 16th July, and the meeting of creditors, at which the defendant attended by his attorney, who examined the Insolvent and did not object to the assignment, and at which it was agreed to discharge the Insolvent, was held on the 28th August following. Held that even if creditors had adopted plaintiff as their assignee, which did not appear, it would not have divested defendant of his rights under the execution, as their ratification of the assignment only related back to the date of the meeting, not to that of the assignment (*McWhirter* vs. *Learmouth*, 18 C. P. 136).

Held that the plaintiff having proved his claim before the assignee, and having obtained an order in this court to set aside the Insolvent's dis-

charge in the Insolvent Court, with costs to be paid to him out of their estate, was precluded from objecting that the assignee was not duly appointed (*Allan* vs. *Garratt et al.* 30 Q. B. 165).

Where a debtor assigns to an official assignee who has not been duly appointed, but the creditors generally accept and act upon the asssignment. *Quœre*—whether the irregularity in the appointment can be set up by an individual creditor as rendering void the assignment (*Newton* vs. *The Ontario Bank*, 13 Grant, 652).

Form of assignment.

15. The assignment mentioned in the next preceding section may be in the form E; and in the Province of Quebec, the deed of assignment may be received by a notary in the authentic form.

Property and powers of Insolvent vested in Official Assignee to whom assignment is made and first Writ issued.

16. Whenever an Insolvent shall have made an assignment, and in case no assignment shall have been made, but a writ or concurrent writs of attachment shall have issued as provided for by this Act, such assignment or such writ or writs of attachment, as the case may be, shall vest in the Official Assignee of the county or district wherein the same shall have issued, all right, power, title and interest which the insolvent has in and to any real or personal property, including his books of account, all vouchers, letters, accounts, titles to property and other papers and documents relating to his business and estate, all moneys and negotiable papers, stocks, bonds and other securities, and generally all assets of any kind or description whatsoever which he may be possessed of or entitled to up to the time of his obtaining a discharge from his liabilities, under the same charges and obligations as he was liable to with regard to the same; and the Assignee shall hold the same in trust for the benefit of the insolvent and his

Conservatory proceedings.

creditors, and subject to the orders of the court or judge; and he may upon such order and before any meeting of the creditors, institute any conservatory process or any proceeding that may be necessary for the protection of the estate; he may also, upon such order, sell and dispose of any part of the estate and effects of the insolvent which may be of a perishable nature; such assignment or writ or writs of attachment shall not however, vest in the assignee, such real and personal property as are exempt from seizure and sale under execution, by virtue of the several Statutes in that case made and provided in the several Provinces of the Dominion respectively, nor the property which the insolvent may hold as trustee for others.

Certain property excepted from seizure.

Section 10 of the Act of 1869, pointed out what property of insolvent vested in the assignee under an assignment. The following cases are important as showing what passes to the assignee under the Act of 1875:—

The plaintiff having held the defendant in the suit to bail, recovered a verdict for slander, for enticing away and detaining his wife, and for assaulting her. Before recovering judgment, he made an assignment under the Insolvent Act, and he then sued the bail on their recognizance, not having yet obtained his final discharge. The defendants set up the rights of the assignee.

Held on demur that the plaintiff was entitled to recover, for the causes of action, being for pure personal wrongs, did not pass to the assignee. Semble also, that the proceeds of the suit when recovered could not be claimed by the assignee, and that he therefore could not in any way interfere with the suit (*White* vs. *Elliot, et al*, 30 U. C. Q. B., 253).

On 10th of February, 1873, defendants obtained an order to stay proceedings until security was given for costs, on the ground that plaintiff had become insolvent. The declaration contained three counts. 1. On fire policy. 2. In trover, alleging as special damage that plaintiff's business was stopped, and he lost customers. 3. In trespass to goods, alleging similar special damage. No objection was made in Chambers, that the cause of action in 2nd and 3rd counts did not pass to the assignee. On

application to the Court, held that the causes of action on 1st and 2nd counts passed to the assignee, for as to the 2nd, as the conversion the primary cause of action passed to the assignee, the special damage dependant upon it, could not be sued for by the debtor. But that the cause of action in the 3rd count did not pass, being for a personal claim of the debtor, independent of his right of property (*Smith* vs. *Commercial Insce. Co.*, 33 Q. B., 529).

V. and J. D. being in partnership, J. D. went out and his father D. D took his place in the firm, about six months after this V. assigned to D. D. all the stock in trade, but the possession was not changed nor the assignment filed. The plaintiff's subsequently became assignees of the firm under the Insolvent Act of 1869, and each of the partners. In an interpleader issue to try their right as against an execution, creditor of V. alone the execution being after the assignment to D. D., but whether before or after the plaintiff's title accrued did not appear. Held that they must be succeed for defcedant, as creditor of one partner could not seize them out of the possession of the assignees of the firm, although he might have a right to V's share of the proceeds if any, after paying the partnership debts (*Wilson* vs. *Vogt*, 24 Q. B., 635).

The appointment of an assignee appointed under compulsory proceedings, under the Act of 1864, vests in him only the estate and effects of the insolvent, as existing, at the date of the issuing of the writ of attachment (*Thorne* vs. *Torrance*, 16 C. P., 445, S. C. in appeal, 18 C. P. 29).

Where a sale has been made under an execution against a judgment debtor, who, after the sale makes an assignment in insolvency, the proceeds of the sale are not vested in the assignee, but go to the judgment creditors (*Brand* vs. *Bickle*, 4 P. R., 191 Chamb).

Previous to an Act of Insolvency, certain lands in which the insolvent, a defendant in a chancery suit, had an equitable interest, had been ordered to be sold, and were afterwards sold and the purchase money paid to the plaintiff in equity. The assignee in insolvency moved that such moneys be paid into court for the benefit of the general creditors. Motion refused with costs (*Yale* vs. *Tollerton*, 2 Chy., Chamb. 49).

An insolvent's reversionary interest in an estate, passes to his assignee, and entitles the assignee to maintain a suit in a proper case for the appointment of new trustees and for an account. But the Court refused to make an order for the sale of such reversionary interest (*Grey* vs. *Hatch*, 18 Grant., 72).

Property which has been placed in the hands of a man for a specified

purpose, will not pass to his assignee upon his bankruptcy (*Ex parte Frere*, Mon. & McA., 262).

A bequest to the bankrupt if he should obtain his certificate passes to his assignees. *Davidson* vs. *Chalmer*. 10 L. T., (N S. S.,) 217.

Where after a deed of assignment for the benefit of creditors by two parties, one becomes bankrupt, the trustees under the deed are entitled only to the joint estate of the debtors, and not to the separate estate of either debtor (*Re Lowdens Settlement*, 10 L. T., (N. S.,) 161).

But the property acquired by a bankrupt up to the time of his discharge passes to his assignees, as well as the right of action respecting it. But he may maintain an action for his personal labour performed after the issuing of the Writ of Attachment (*Chippendale* vs. *Tomlinson*, Cook 428 ; *Silk vs. Osborne*, 1 Esp. 140, *and Williams* vs. *Chambers*, 11 Jur. 798.) And he may maintain an action with relation to after acquired property. (*Webb* vs. *Fox* 7, T. R. 391; *Fowler* vs. *Down*, 1 B. & F. 44; *Evans* vs. *Brown* 1 Esp 170; *Leroche* vs. *Wakeman*, Peake 190) or sue upon a contract made with him (*Cumming* vs. *Roebuck*, Holt, 172) unless the assignees interfere (*Kitchen* vs. *Burtsch*, 7 East 53; *Herbert* vs. *Sayer*, 2 Dow & L 49).

A legatee entitled under a will to such share as testator's widow should appoint and in default to one-fifth of a moiety, by a deed under the Bankrupt Act, 1861, assigned all his estate and effects to trustees for creditors. The widow having subsequently appointed the legatee the same share that he would have taken in default of appointment, it was held that the appointed share did not pass to the trustees under the deed of assignment (*In re Vizards Trusts* 1 L. R Eq. 667 following *Lee* vs. *Olding* 2 Jur. N. S. 850).

The assignment will not displace a Solicitor's lien for costs or entitle the assignee to possession of the papers (*In re Moss*, 2 L. R. Eq. 345).

A payment made by the insolvent after the issue of a writ of attachment on account of a draft discounted by bankers for him, and which was dishonoured by non-acceptance, is recoverable back by the official assignee though the bankers were ignorant of the insolvency when they received the money from him (*Roe* vs. *Royal Canadian Bank* 19 C. P. U. C. 347.)

Decided by Monck, J. in Montreal that, the moneys which had been seized by a judgment creditor of the insolvent prior to the assignment, but at the time of the assignment pending in court could be attached by the assignee, to be divided amongst the creditors generally (*Bacon* vs. *Douglass and Converse Ass.* 15 L. C. Rep. 456).

An assignment will not vest in the assignee property beyond the reach of the insolvent laws (*Roe* vs. *Smith*, 15 Grant. 344).

Stoppage in Transitu.—When goods purchased by a bankrupt on credit have been unconditionally delivered to him, or have come into his possession before the bankruptcy, the vendor will have no lien on them for his unpaid purchase money ; but they will be distributable under the bankruptcy, and the vendor must come in and prove as an ordinary creditor (*Snee* vs. *Prescott* 1 Atk. 249).

If the goods once get into the possession, actual or constructive, of the vendee the transitus is at an end, and by consequence, the right of the vendor to stop them, but as to what will amount to such a delivery as to divest the vendor's right to stop, or under what circumstances goods shall be considered in transitu or not, are questions frequently of difficulty. It may be stated generally that the same sort of delivery which as between buyer and seller where there is no insolvency would be sufficient to deprive the vendor of the right to retake the goods, would not necessarily be so in case of the purchasers becoming insolvent or bankrupt (*Ellis* vs. *Hunt*, 3 T. R. 469 ; *Wilmshurst* vs. *Bowker*, 7 M. & G. 882 ; 8 *Scott*, N. R. 571). A consideration which has been sometimes overlooked (*Schotsman* vs. *Lancashire & Yorkshire Railway Co.*, L. R., 1 Eq. 349 ; *L. R.* 2 Chy. Ap. 332).

As a general rule, if the goods have arrived at the destination originally named by the purchaser, and upon their arrival at which they become stationary until a new direction from him, then the transit is at an end, and the right to stop determined (*Dixon* vs. *Baldwin*, 5 East. 175 ; *Leeds* vs. *Wright*, 3 B. & P. 320 ; *Wentworth* vs. *Outwaite*, 10 M. & W. 451).

And if a man is in the habit of using the wharf or warehouse of another as his own, and of making it the repository of his goods, and disposing of them there, then the transitus will be at an end when the goods arrive at such wharf or warehouse (*James* vs. *Griffin*, 1 M. & W. 20.)

But the consignee must have obtained a full control over the goods, the delivery of them at the wharf or warehouse must be perfected, and the mere arrival of the ship at the wharf without a delivery of the goods will not be sufficient to determine the transit (*Fraser* vs. *Witt*, *L. R.* 7 *Eq.* 264).

Delivery of a part of a cargo will with a view to the delivery of the whole as a general rule, divest the vendor's right to stop the remainder (*Slubey* vs. *Heyward*, 2 H. Bl. 504 ; *Hammond* vs. *Anderson*, 1 B. & P., N. R. 69).

But this will not be the case if the intention was merely to separate a

part from the whole, or if the delivery was not complete on the part of the carrier so as to divest him of his lien for freight (*Edwards* vs. *Brewer*, 2 M. & W. 376).

It has been held in *Hawksworth* vs. *Elliott et al*, and Brown, assignee in appeal in Quebec, that the delivery of goods purchased in Great Britain by the insolvents, merchants in Montreal, to the agent of the latter in Liverpool, deprived the vendor of the right of stoppage in transitu.

Where the Assignee and creditors of a bankrupt who has not obtained his discharge allow him to trade or contract debts without their interferance or claim, it falls within the principle of a man having a lien standing by and allowing another to take a new security whereby he is postponed, and the subsequent creditors of the bankrupt will be preferred to the creditors under the bankruptcy ; *Troughton* vs. *Gittey*, *Amb.* 630. When the goods of "A" having been seized by the Sheriff under an execution against B, had been handed over by the Sheriff to the Assignee to whom B. had made a voluntary assignment in insolvency, held that "A" might maintain replevin against the Assignee, and that Sec. 50 of the Insolvent Act of 1869 could not apply against the plaintiff, who was not a creditor in any way interested in the estate of the Insolvent ; *Burke* vs. *McWhirter*, 35 U. C., Q. B. 1 ; see *Brown* vs. *Wright*, U. C. Q. B., 1874, not yet reported ; *McGregor* vs. *Hume*, 28 U. C. R. 280 ; *Colter* vs. *Mason*, 30 U. C. R. 181 ; *Alexander* vs. A. B. C. & D., 5 U. C. R. 329 ; *Henry* vs. *Douglas*, 1 L. J. U. C. (N. S.) 108 ; *Canverse* vs. *Michie*, 16 U. C. C. P. 126 ; *Brand* vs. *Bickle*, 4 P. R. 191 ; *Re McKenzie*, 31 U. C. R. 1 ; *Bank of Montreal* vs. *Little*, 17 Grant 313.

The following chattels are hereby declared exempt from seizure under any writ issued out of any court whatever in the Province of Ontario, viz :

1. The bed, bedding and bedstead in ordinary use by the debtor and his family.

2. The necessary and ordinary wearing apparel of the debtor and his family.

3. One stove and pipes, one crane and its appendages, one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one table, six chairs, six knives, six forks, six plates, six tea-cups, six saucers, one sugar-basin, one milk-jug, one tea-pot, six spoons, all spinning wheels and weaving looms in domestic use, ten volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use.

4. All necessary fuel, meat, fish, flour vegetables actually provided for family use, not more than sufficient for the ordinary consumption of the

debtor and his family for thirty days, and not exceeding in value the sum of forty dollars.

5. One cow, four sheep, two hogs, and food therefor for thirty days.

6. Tools or implements of or chattels ordinarily used in the debtor's occupation to the value of sixty dollars.

In the Province of Quebec, *Code Civ. Pro., Art* 556, the following is the list of exemptions :

1. The bed, bedding, and bedsteads in ordinary use by the debtor and his family.

2. The neeessary and ordinary wearing apparel of the debtor and his family.

3. One stove and pipes and one crane and its appendages, one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one table, six chairs, six knives, six forks, six plates, six tea-cups, six saucers, one sugar-basin, one milk-jug, one tea-pot, six spoons, all spinning-wheels and weaving looms in domestic use, and ten volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use.

4. Fuel and food not more than sufficient for thirty days, and not exceeding in value the sum of $20 00.

5. One cow, four sheep, two hogs, and food therefor for thirty days.

6 Tools and implements or other chattels ordinarily used in the debtor's occupation to the value of $30 00.

7. Bees to the extent of 15 hives.

In New Brunswick and Prince Edward's Island wearing apparel and kitchen utensils to the amount of £15 0 0, and in Nova Scotia to the value of $40 00 are exempted.

Insolvent to furnish statement of his liabilities, assets, &c.

17. The Insolvent shall, within ten days of the date of the assignment, or from the date of the service of the writ of attachment, or if the same be contested, within ten days from the date of the judgment rejecting the petition to have it quashed, furnish the Assignee with a correct statement (Form F.) of all his liabilities direct or indirect, contingent or otherwise, indicating the nature and amount thereof, together with the names, additions

and residences of his creditors and the securities held by them, in so far as may be known to him.

What it must show

The Insolvent shall also furnish within the same delay a statement of all the property and assets vested in the Assignee by the deed of assignment or by the writ or writs of attachment issued against him, and such statement shall in all cases include a full, clear, and specific account of the causes to which he attributes his Insolvency, and the deficiency of his assets to meet his liabilities. The Insolvent may at any time correct or supplement the statements so made by him of his liabilities and of his property and assets.

Under the 3rd Section of Act of 1869, the Assignee was required to prepare statements showing the position of the Insolvent's affairs, which was to be exhibited at the first meeting of creditors, and the insolvent was required to assist in the preparation of the statement, and attend at meeting to be examined on oath touching its contents.

The above clause requires the Insolvent to prepare within ten days and furnish the Assignee with the statement of liabilities, and also of all the property and assets vested in the Assignee. The act therefore assumes that the Assignee will permit the insolvent to have such access to the estate as will enable him to prepare the required statements.

Petition by Insolvent to set aside attachment.

18. The Insolvent may present a petition to the judge at any time within five days from the service of the writ of attachment; and may thereby pray for the setting aside of the attachment made under such writ, on the ground that the party at whose suit the writ was issued has no claim against him, or that his claim does not amount to two hundred dollars beyond the value of any security which he holds, or is not provable in insolvency, or that his estate has not become subject to liquidation; or if the writ of attachment has issued against a debtor by reason of his neglect to satisfy a writ of execu-

tion against him as hereinbefore provided, then on any of the above grounds, or on the ground that such neglect was caused by a temporary embarrassment, and that it was not caused by any fraud or fraudulent intent, or by the insufficiency of the assets of such debtor to meet his liabilities; and such petition shall be heard and determined by the judge in a summary manner, and conformably to the evidence adduced before him thereon; and the judgment, subject to appeal as hereinafter provided, shall be final and conclusive.

Hearing in such case.

Under the 26th Section of the Act of 1869 the above petition was required to be presented within three days.

A creditor issuing an attachment under the Act of 1864 (which was also five days as above) could not after five days from the return day of the writ withdraw the attachment, so as to prevent another creditor from intervening for the prosecution of the cause (*Worthington* vs. *Taylor*, 10 L. J. U. C. 333).

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19. A copy of the deed of assignment or a copy of the writ of attachment as the case may be, certified by the Assignee or the clerk of the court, shall forthwith be registered in the registry office of the county wherein the Insolvent resides, and also in every county or registration district wherein he may have any real estate; in the Province of Quebec such deed of assignment or writ of attachment shall be accompanied by a description of the real estate belonging to the Insolvent, and shall be registered in the county or registration district wherein the same is situate, with a notice that the same has, by such assignment or writ of attachment been transferred to the Assignee.

Registration of Assignment and transfer.

To compel the Assignee to furnish a description of Insolvent's lands when registering copy of deed of assignment or writ of attachment might often defeat the object of the Act, and so far at least as Ontario is concerned, the creditors will best be protected by registering a copy of assignment or writ of attachment under the Grantor's and Grantee's Index.

An Assignee in Insolvency cannot acquire priority over a prior vendee of the Insolvent, by prior registration of the instrument appointing such Assignee (*Collier* vs. *Shaw*, 19 Grant, 599).

A list of creditors need not be appended to an assignment to an Official Assignee (*Hingston* vs. *Campbell*, 2 U. C. L. J. [N. S.] 299).

First Meeting of creditors, how called.

20. Immediately after the assignment shall have been made, or in the case of an attachment, immediately after the delay within which the attachment can be contested or immediately after the contestation has been rejected, or with the consent of the Insolvent immediately after the writ shall have been returned, the Official Assignee shall forthwith call a meeting of the creditors of the Insolvent to be held at the place and on the day and hour to be mentioned, notice of which meeting, in the Form G, shall be published at least twice in the Official Gazette, the first publication of which notice shall be at least three weeks before the day fixed for such meeting.

Form.

Notice to each creditor by mail.

21. The Assignee shall also forward by mail, a least ten days before the meeting takes place, a notice in writing to every creditor mentioned in the original or any corrected or supplementary list or statement furnished by the Insolvent, or who may be known to him to be a creditor, and give such other notice as the circumstances of the case

may require. But in case the Assignee is unable to obtain such list, then ten days' notice shall be given by advertisement in one local or the nearest published newspaper. Proviso.

In case of an assignment the Assignee is to give notice immediately, in case of attachment notice must not be given until the expiration of the five days from the service of the writ of attachment allowed by Sect. 18, for the Insolvent to present a petition praying that the attachment may be set aside, or, if contested, then not until such time as the petition has been rejected. The Insolvent may consent that the notices shall be given immediately after the return of the Writ.

The notices sent by mail to the creditors must contain a list of the creditors holding claims for $100 each and upwards. Form G.

The first publication of the notice must now be at least three weeks before day fixed for meeting. Under 2nd Sec. of Act of 1869, the first publication of notice was required to be two weeks prior to the meeting.

EXAMINATION OF INSOLVENTS.

22 The creditors at their first meeting held at the time and place fixed for that purpose, may appoint one of themselves as chairman of the meeting; and at all subsequent meetings the Assignee shall be chairman. Who shall preside at meetings.

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23. The Insolvent shall be bound to attend at the first meeting of his creditors, and after making such corrections as he may deem proper to his statements of liabilities and assets, shall attest the same under oath. He may also be examined under oath before the Assignee, by or on behalf of any creditor touching his affairs; and more especially as to the causes of his insolvency and the deficiency of his assets to meet his liabilities. Insolvent to attend and be examined as to cause of failure especially.

If on such examination the Insolvent does not fully and truly discover all his property, and how and to whom and when he sold or disposed of the whole or any part thereof, he shall be guilty of a misdemeanor. See Sec. 140, of this Act.

Attestation, &c., of examination.

24. The Insolvent shall sign his examination or declare the reasons why he refuses to sign, and the examination shall be attested by the Assignee.

Insolvent subject to further examination.

25. The Insolvent shall, at all times until he shall have obtained a confirmation of his discharge, be subject to the order of the court or judge, and to such other examination as the judge, the Assignee, the Inspectors hereinafter mentioned, or the creditors may require; and he shall, at the expense of the estate, execute all proper writings and instruments, and perform all acts required by the court or judge touching his estate; and in case the Insolvent refuses to be sworn or to answer such questions as may be put to him, or to sign his answers or the writings or instruments, or refuses to perform any of the acts lawfully required of him, such Insolvent may be committed and punished by the court or judge as for a contempt of court.

Refusal to answer, &c., to be contempt of Court.

Examination of wife or husband of Insolvent.

26. The court or judge may also on the application of the Assignee, of the Inspectors, or of any creditor, order any other person, including the husband or wife of the Insolvent, to appear before the court or judge or the Assignee, to answer any question which may be put to him or her touching the affairs of the Insolvent and his conduct in the management of his estate; and in case of refusal to

appear and to answer the questions submitted, such person may be committed and punished by the court or judge as for a contempt of court.

The 26th Sect. is a consolidation of Sects. 112 and 114 of 1869, and the order for the examination was obtained *Ex parte* on the petition of the Assignee, setting forth satisfactory reasons for such order; and where the husband or wife of the Insolvent was sought to be examined the petition required to be substantiated under oath.

A witness appearing is not obliged to testify until his expenses are paid. An Insolvent not entitled to claim his expenses before being sworn (*Worthington* vs. *Taylor*, 10 *L. J. U. C.* 304).

A person summoned as a witness cannot refuse to give evidence respecting his own dealings with the Insolvent by alleging that he is a creditor (*In re Hamilton*, 1 U. C. L. J. [N. S.] 252).

ASSIGNEES AND INSPECTORS.

Appointment of Official Assignee.

27. The Governor in Council may appoint in the several Provinces of Canada, except the Province of Quebec, one or more persons to be Official Assignee or Assignees or Joint Official Assignee in and for every county; and in the Province of Quebec, such appointment of an Official Assignee, or Official Assignees, or Joint Official Assignee, shall be made in and for each judicial district in the Province, except that in each of the Judicial Districts of Quebec, Montreal, and St. Francis respectively, such appointment may be made either for the whole district or for one or more electoral districts in the same; and the word "district" shall mean either a judicial or an electoral district as the context may require.

Ontario.

Quebec.

District, what to be.

See notes to Sec. 2. Supra.

Security given by Official Assignee.

28. Each person so appointed Assignee or Joint Assignee shall hold office during pleasure, and before acting as such shall give security for the due fulfilment and discharge of his duties in a sum of two thousand dollars, if the population of the county or district for which he is appointed does not exceed one hundred thousand inhabitants, and in the sum of six thousand dollars if the population exceeds one hundred thousand,—such security to be given to Her Majesty for her benefit and for the benefit of the creditors of any estate which may come into his possession under this Act; and in case any such Assignee fails to pay over the moneys received by him or to account for the estate, or any part thereof, the amount for which such Assignee may be in default may be recovered from his sureties by Her Majesty or by the creditors or subsequent Assignee entitled to the same, by adopting, in the several Provinces, such proceedings as are required to recover from the sureties of a sheriff or other public officer.

Recovery under Court.

Additional curity.

a. The Official Assignee may also be required to give in any case of Insolvency such further security as, on petition of a creditor, the court or judge may order—such additional security being for the special benefit of the creditors of the estate for which the same shall have been given.

Responsibility, &c., of Official Assignee.

b. The Official Assignee shall be an officer of the court having jurisdiction in the county or district for which he is appointed. He shall as such be subject to its summary jurisdiction and to the summary jurisdiction of a judge thereof, and be accountable

for the moneys, property and estates coming into his possession as such Assignee, in the same manner as sheriffs and other officers of the court are.

Appointment of, and security given by assignee not official.

29. The creditors at their first meeting, or at any subsequent meeting called for that purpose, may appoint an Assignee who shall give security to Her Majesty in manner, form and effect, as provided in the next preceding section, for the due performance of his duties to such an amount as may be fixed by the creditors at such meeting. In default of such appointment the Official Assignee shall remain the Assignee of the estate, and shall have and exercise all the powers vested by this Act in the Assignee. The creditors may also, at any meeting called for that purpose, remove any Assignee and appoint another in his stead. A certified copy of any resolution of the creditors appointing an Assignee shall be transmitted in every case to the clerk of the court wherein the proceedings are pending to remain of record in his office.

What creditors only shall vote at meetings.

No creditor shall vote at any meeting unless present personally or represented by some person having a written authority, to be filed with the Assignee, to act at any or all such meetings on his behalf, and no more than one person shall vote as a creditor on any claim for the same debt; persons purchasing claims against an estate after insolvency, shall not be entitled to vote in respect of such claims, but shall, in all other respects, have the same rights as other creditors; and no claim after being proved shall be divided and transferred to another person or party to increase the number of votes at any

Claims not to be divided for voting.

meeting: each claim shall continue to have one vote only in number.

The 5th and 6th sections of the Act of 1869 provide for the appointment of the Assignee, and the 51st section of that Act for his removal.

As to the mode of voting for an Assignee, see Section 102 post.

At a meeting of creditors held to give their advice upon the appointment of an Official Assignee, it was held that the creditors of the individual partners had the right, as well as the creditors of the firm, to vote in the choice of an Assignee (*Luxton* vs. *Hamilton & Davies*, 10 L. J. 334).

Appointment of an agent for a creditor claiming to advise in the choice of an Assignee must be in writing, and filed of record (*In re Campbell*, 1 U. C. L. Journal [N. S.] 135).

Although no neglect or irregularity in any of the proceedings antecedent to the appointment of an Assignee shall vitiate the subsequent assignment, it might probably be held that an omission of any such proceedings would render the assignment one made otherwise than in the manner prescribed by this Act, and an act of bankruptcy upon which proceedings in compulsory liquidation might be taken.

The latter part of the above section, as to more than one creditor voting on the same debt or purchasing debts after assignment, and as to dividing claims to increase votes, is new.

No complaint appears necessary to effect a removal of the Assignee; the creditors' desire is sufficient.

But as the majority in number of the creditors called for removing an Assignee might not agree with the majority in value, and the question in such case would require to be referred to the Judge, it may be useful to consider the principles upon which Assignees have been removed in England.

If the election of the Assignee is procured by fraud that will be sufficient ground for removing him (*Ex parte Durent*, Buck. 201).

So also if a large body of the creditors are excluded from voting by the mistake of the Assignee in rejecting their proofs, and the election of the trustee is, in consequence, made by a few small creditors (*Ex parte Edwards*, Buck. 411). So also if the major part of the creditors are excluded from voting by some unavoidable accident. (*Ex parte Chapeaurouge*, M. & Mac. 174). On the other hand, it would not be a sufficient reason for setting aside an Assignee, that some of the creditors were unprepared to prove who, if they proved, would have carried the election another way (*Ex parte Butterfill*, 1 Rose 192); or that the election was carried by votes

of creditors having an adverse interest to the general body of creditors (*Ex parte Surtees*, 12 Ves. 10).

But if the Assignee has an interest adverse to the general body of creditors, that will be a good ground for removing (*Ex parte Surtees*, 12 Ves. 10).

So also, if being a creditor, he sells his debt to another creditor adversely interested (*Ex parte Stagg*, 2 M. D. & D. 186).

If the Assignee is guilty of a breach of trust or misconduct in the discharge of his duties, it will be a sufficient ground for removing him, and he will be saddled with the costs of removal (*Ex parte Townsend*, 15 Ves. 47 ; *Ex parte Angle*, 4 D. & C. 118) ; or is an accounting party to the estate (1 Bank and Ins. Rep. 285) ; or if the bankrupt have interfered in the choice (*Ex parte Molineux*, 3 M. & A. 703) ; or the creditors had not sufficient notice to enable them to be present (*Ex parte Moris*, 1 Dea. 498).

The election will be set aside if the parties voting on the choice be not entitled to vote (*Ex parte Rowe*, De G. Rep. 111) ; or if the person who is liable to account to the bankrupt's estate be the only one who has proved and elected himself (*Ex parte Grimsdale*, 28 L. T. Rep. 207) ; or if the bankrupt may exercise an undue influence on the party chosen (*Ex parte Morse*, De G. 478) ; or where the Assignee had been chosen without his consent or knowledge, and declined to act (*Ex parte Pearson*, 3 Dea. 324).

If an Assignee appoints a solicitor who is related to the insolvent, and refuses to remove him, he may be himself removed (*Ex parte, Bates*, 1 De M. & G. 452). So an Assignee may be removed where he improperly connives at the insertion in the insolvent's balance sheet of a petitioner's debt, or when the Assignee becomes insolvent (*Ex parte Perryer*, 1 M. D. & D., 276) ; but the petition must be presented promptly (*Ex parte Coslett*, 1 Moll. 62). Mere poverty, though of itself not a sufficient ground of removal, yet if attended by suspicious circumstances as the use of fictitious votes in the Assignee's election, will warrant a removal (*Ex parte Copeland*, 1 M. & A. 305). Where an Assignee acting under a *bona fide* belief that all the other creditors were to be compounded with, agreed with the bankrupt to compromise his own debt, the Court declined to remove him (*Ex parte Davison*, 2 Bank. & Ins. Rep. 89). If an Assignee abscond or become permanently resident out of the country, another will be chosen in his place (*Ex parte Higgins*, 1 Ba & Be, 218 ; *Ex parte Grey*, 13 Ves. 274).

Assignees will not be permitted, either directly or indirectly, to become

purchasers of any of the insolvent's property (*Ex parte Badcock*, M. & McA. 231, 238); and any Assignee so purchasing without leave will be removed and ordered to account for profits (*Ex parte Alexander*, 1 Dea. 273). See *Ex parte Thomson*, 9 L. J. Chy. 17, where the purchase of a small portion of the estate by the Assignee did not justify his removal. If an Assignee wish to purchase at any sale of the insolvent's property, he must first petition the Court to be discharged from his office (*Ex parte Alexander*, 1 Dea. 273); and pay his own costs of petition (*Ex parte Perkes*, 3 M. D. & D. 385). This petition must be served on the insolvent (*Ex parte Bage*, 4 Madd. 459). It would be advisable here to serve the Inspector as well.

See form for security to be given, Form No. 3.

Transfer of estate by Official Assignee.

30. As soon as the security required from the Assignee appointed by the creditors shall have been furnished by him, it shall be the duty of the Official Assignee to account to him for all the estate and property of the Insolvent which has come into his possession, and to pay over and deliver to him all such estate and property, including all sums of money, books, bills, notes and documents whatsoever belonging to the estate, and to execute in his favour a deed of assignment in the Form H.

If the creditors appoint an Assignee without calling upon him to provide security, the Official Assignee would no doubt be compelled to deliver to such creditors' assignee the insolvent's estate.

Notice of appointment.

31 Every Assignee on his becoming such shall give notice of his appointment as such by advertisement in the Form I, and by a copy thereof sent to each creditor by post and post-paid.

Assignee not to act as agent of a creditor.

32. No Assignee shall act as the attorney or agent of any creditor in reference to any claim or demand

of such creditor on an insolvent estate of which he is the Assignee.

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33. An Assignee may however, on being authorized by the judge, act as the attorney or agent of a creditor when the action to be taken is in the interest of the estate or of the creditors generally. Exception.

The above sections, 32 and 33, are new.

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34. The creditors may, from time to time, at any meeting, determine where subsequent meetings shall be held; and until they shall have passed a resolution to that effect all meetings of the creditors shall be held at the office of the Assignee, unless otherwise ordered by the judge. Place for meetings.

Under the 20th section the Official Assignee is authorized to name the day, place and hour for calling the first meeting of creditors, but from the reading of this section he is obliged to call the first meeting at his own office.

At the first or any subsequent meeting the creditors have power to determine where the subsequent meetings shall be held.

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35. The creditors at any meeting may appoint one or more Inspectors, who shall superintend and direct the proceedings of the Assignee in the management and winding up of the estate; and they may also at any subsequent meeting held for that purpose, revoke the appointment of any or all the said Inspectors; and upon such revocation, or in case of death, resignation or absence from the Province of such Inspectors, may appoint others in their stead; and such Inspectors may be paid such Inspectors, their appointment, &c., by creditors.

Remuneration of Inspectors; they and Assignee not to purchase Insolvent's property.

remuneration as the creditors may determine; and whenever anything is allowed or directed to be done by the Inspectors, it may or shall be done by the sole Inspector if only one has been appointed. But no Assignee as Inspector or any insolvent estate shall purchase directly or indirectly any part of the stock in trade, debts or assets of any description, of such insolvent estate.

Under the English Act the separate creditors were not allowed to vote under a joint adjudication in the choice of Assignees. But if the interest of the joint creditors were adverse to that of the separate creditors or for any other purpose it was desirable to appoint any person to protect the interests of the separate creditors, an Inspector might be appointed for the purpose of getting in the separate estate, and on indemnifying the Assignee might bring actions in his name. Under that Act Inspectors were only appointed where there were joint and separate creditors of the bankrupt, to look after the interests of the separate or joint creditors as a class (*Ex parte Wright*, 2 M. D. & D. 434; *Ex parte Batson*, 1 G. & J. 269; *Ex parte Miles*, 2 Rose 68; *Ex parte Wilson*, 1 M. D. & D. 68). The power of appointing Inspectors here was conferred by the 34th Sect. of the Act of 1869, and has, where judicious appointments have been made, been productive of great benefits. By this means much time and expense is saved in the calling of meetings for the purpose of advising the Assignee, as the general knowledge of business which an Inspector is likely to possess (and without which no Inspector should be appointed) will generally prove more advantageous in the winding up of an estate than where the duties devolve upon the general body of creditors, as it generally happens that what is everybody's business is nobody's business.

Disposal of estate of Insolvent.

36. The creditors may, at any meeting, pass any resolution or order directing the Assignee how to dispose of the estate real or personal of the Insolvent; and, in default of their doing so, the Assignee shall be subject to the directions, orders and instructions he may, from time to time, receive from the Inspectors, with regard to the mode, terms and con-

ditions on which he may dispose of the whole or any part of the estate.

In default of directions being given by the creditors to the Assignee as to the disposal of the estate, the Inspectors—if such are appointed—possess full authority for that purpose.

Objection to proposed mode of disposal of estate.

37. Any one or more creditors whose claims in the aggregate exceed five hundred dollars, who may be dissatisfied with the resolutions adopted or orders made by the creditors or the Inspectors, or with any action of the Assignee for the disposal of the estate or any part thereof, or for postponing the disposal of the same, or with reference to any matter connected with the management or winding up of the estate, may, within twenty-four hours thereafter, give to the Assignee notice that he or they will apply to the court or judge, on the day and at the hour fixed in such notice, and not being later than forty-eight hours after such notice shall have been given, or as soon thereafter as the parties may be heard before such court or judge, to rescind such resolutions or orders. And it shall be lawful for the court or judge, after hearing the Inspectors, the Assignee and creditors present at the time and place so fixed, to approve, rescind or modify the said resolutions or orders. In case of the application being refused the party applying shall pay all costs occasioned thereby, otherwise the costs and the expenses shall be at the discretion of the judge.

Hearing by Court or Judge.

This section is new, and entitles the minority to appeal to the judge against any resolution passed by the majority of the creditors. It is not likely a motion would avail much if the act complained of was acquiesced in by the majority in number, and three-fourths in value of the credi-

tors represented at a meeting where the creditor making the motion was neither present or represented at the meeting. Had he been present he might have, by enunciating his views, prevented the act being done of which he complains; but by not being present or represented he should forfeit all right to object to the proceedings assented to by the general body of the creditors.

Under this section, when a motion is refused, the judge has no alternative but to award all the costs against the creditor making the motion.

Powers of Insolvent vested in Assignee.

38. The Assignee shall exercise all the rights and powers of the Insolvent in reference to his property and estate. And he shall wind up the estate of the Insolvent, by the sale in the ordinary mode in which such sales are made, of all bank or other stocks, and of all moveable property belonging to him, by the collection of all debts or by the sale of the estate of the Insolvent, or any part thereof, if such be found more advantageous, at such price and on such terms as to the payment thereof as may seem most advantageous:

Proviso as to sale of entire estate.

Provided that no sale of the estate *en bloc* shall be made without the previous sanction of the creditors given at a meeting called for that purpose; and provided also that no such sale shall affect, diminish, impair or postpone the payment of any mortgage or privileged claim on the estate, or property of the Insolvent, or on any portion thereof.

Advertisements by Assignees in Insolvency for the sale of property of the Insolvent should describe the property and state the title with the distinctness required in equity, in the case of advertising by trustees and other officials. In case of a sale by an Assignee in Insolvency being open to objection on the part of the creditors, the remedy of objecting creditors is by application to the County Court Judge, not by suit in Chancery in the first instance (*O'Rielly* vs. *Rose*, 18 Chy. 33). As to rights of Assignee as against a creditor who is a mortgagee of Insolvent's estate, see *in re Hurst*, 31 U. C. R. 116, and cases there cited.

39. The Assignee, in his own name as such, shall have the exclusive right to sue for the recovery of all debts due to or claimed by the insolvent of every kind and nature whatsoever; for rescinding agreements, deeds and instruments made in fraud of creditors, and for the recovery back of moneys alleged to have been paid in fraud of creditors, and to take, both in the prosecution and defence of all suits, all the proceedings that the insolvent might have taken for the benefit of the estate, or that any creditor might have taken for the benefit of the creditors generally; and may intervene and represent the Insolvent in all suits or proceedings by or against him which are pending at the time of his appointment, and on his application may have his name inserted therein in the place of that of the Insolvent. And if after an assignment has been made or a writ of attachment has issued under this Act, and before he has obtained his discharge under this Act, the insolvent sues out any writ or institutes or continues any proceeding of any kind or nature whatsoever, he shall give to the opposite party such security for costs as shall be ordered by the court before which such suit or proceeding is pending, before such party shall be bound to appear or plead to the same or take any further proceeding therein.

Assignee to sue for debts due Insolvent, &c.

If Insolvent sues for the same after assignment or attachment.

This Section corresponds with the 42nd Sec. of the Act of 1869. See notes to previous section : *Held* that an action may be brought against an Assignee for a dividend on a duly collocated and advertised claim which has not been objected to (*Simpson* vs. *Newton*, 4 L. J. N. S. 46). An Official Assignee in Insolvency sued for trespass in taking and selling goods is not entitled to notice of action (*Archibald* vs. *Haldan*, 30 Q. B. 30). When a defendant becomes insolvent after the service of a bill upon him but before the time for answering expires, and the suit is thereupon

revived against the Assignee in Insolvency, it is necessary to serve the Assignee with the bill as well as with the order to revive or an order pro confesso cannot be obtained (*Smith* vs. *Lines*, 1 Chy. Cham. 398). Goods are repleviable out of the hands of an Assignee in Insolvency notwithstanding C. S. U. C. Chap. 29. Sec. 2 (*Jamieson et al* vs. *Kerr*, 6 P. R. 3. C. L. Chamb.

Where the goods of A having been seized by the Sheriff under an execution against B had been handed over by the Sheriff to an Assignee to whom the debtor had made a voluntary assignment in insolvency : *Held* that A might maintain replevin against the Assignee : *Held* also that Section 50 of the Act of 1869 could not apply against the plaintiff who was not a creditor in any way interested in the estate of the Insolvent (*Burke* vs. *McWhirter*, 35 U. C. Q. B. 1).

M. deposited a sum of money with the plaintiffs, and soon after absconded. The plaintiffs had given him a receipt, stating that the money was payable on production of that document. A writ of attachment issued against the depositor's property, and the defendant Little was appointed Official Assignee. He demanded the money without producing the receipt. He then sued the plaintiffs for the money : *Held* that he was entitled to recover (*Bank of Montreal* vs. *Little*, 17 Grant 313).

A and B, traders, made an assignment under the Insolvent Act. A judgment at law having been obtained against A, his interest in the partnership assets was sold for a nominal consideration to C, who had notice of the insolvency proceedings. C then entered into possession of and otherwise interfered with the partnership goods, so as to hinder the plaintiffs from the execution of their office. An injunction was granted on the application of the Assignees to restrain the defendant from further interference (*Neilson* vs. *Corby*, 11 Grant, 92).

If an Assignee decline to prosecute a suit the creditors are entitled to do so upon indemnifying the Assignee against the costs (10 L. J. [N. S.] 102) ; and the judge may sanction a suit in the name of the Assignee for the benefit of the creditors, notwithstanding a majority in value and number have passed a resolution forbidding further proceedings (*In re Lamb*, 13 U. C. Chy. Rep. 391). To a suit for foreclosure against the Assignee of the estate of a bankrupt mortgagor, the bankrupt is not a necessary party (*Torrance* vs. *Winterbottom*, 2 Grant, 487).

Even the charge of fraud in a bill filed against a bankrupt and his Assignees, seeking to set aside certain conveyances as having been fraudulently procured by the bankrupt before the bankruptcy, does not justify the making the bankrupt a party ; and although a decree declaring the deeds to be fraudulent would in a sense make the bankrupt a trustee of

the property, this was not sufficient to make him a party to the suit (*Gilbert* vs. *Lewis*, 2 J. & H. 452).

A bill filed by one of the creditors of an insolvent to recover property alleged to belong to the insolvent's estate, on the mere allegation that the Assignee in Insolvency refused to sue without an indemnity against costs of the suit, and that the plaintiff, through poverty, was unable to give such indemnity is demurrable (*Davis* vs. *Snell*, 2 D. G. F. & J. 463).

A demurrer by an Insolvent on the ground that he was not a proper party was allowed (*Wilson* vs. *Chisholm*, 11 Grant, 471).

An objection was raised to an application under this provision by an Official Assignee to be allowed to intervene and represent the insolvent in a suit wherein the Insolvent was plaintiff, on the ground that the insolvent plaintiff was a foreigner, neither resident or domiciled in Canada, but not decided (*Mellon* vs. *Nichols*, 27 Q. B. U. C. 167). It was considered necessary in the English Act of 1861, sec. 277, that it should extend to aliens and denizens, to make them subject thereto, and to entitle them to all the benefits given thereby.

Partnership dissolved by Insolvency of a partner.

40. If a partner in an unincorporated trading company or co-partnership becomes insolvent within the meaning of this Act, and an Assignee is appointed to the estate of such insolvent, such partnership shall thereby be held to be dissolved; and the Assignee shall have all the rights of action and remedies against the other partners in such company or co-partnership, which the said insolvent partner could have or exercise by law or in equity against his co-partners after the dissolution of the firm, and may avail himself of such rights of action and remedies, as if such co-partnership or company had expired by efflux of time.

This section is a re-enactment of the 43rd section of the Act of 1869.

The general rule is, that by the bankruptcy of one partner the partnership is dissolved as to all the partners (*Ex parte Smith*, 5 Ves. 295; *ex parte Williams*, 11 Ves. 5).

This, however, is not the result in the case of an unincorporated joint-stock company, the shares of which are transferable. The effect of the bankruptcy of a shareholder in a company of this description is merely to dissolve the connection of the bankrupt with the company (*Greenshield's case*, 5 De G. & S. 599).

So also in the case of a mine partnership, in which the shares are assignable, and each member is regarded as a sort of shareholder rather than a partner in the ordinary acceptation of the term, the bankruptcy of one partner does not involve the total breaking up of the partnership (*Ex parte Broadbent*, 1 M. & A. 638 ; *Crawshaw and Collins*, 15 Ves. 225).

Upon the bankruptcy of a partner, his power over the partnership property ceases, and his share of the property—that is of the surplus after paying the partnership debts and the claims of his co-partner—will vest, together with his separate estate, in the Assignee, who, in respect of the bankrupt's share of the partnership assets, will become tenant in common with the solvent partner (*Harvey and Cricket*, 5 M. & S. 336 ; *Woodbridge* vs. *Swan*, 4 B. and Ad. 633 ; *Coldwell and Gregory*, 1 Price 119, 2 Rose 149).

If the solvent partner is willing to undertake the winding up of the partnership affairs he will be entitled to do so, provided he do so honestly and fairly, and not by way of fraudulent preference (*Harvey* vs. *Cricket Woodbridge* vs. *Swan and Coldwell* vs. *Gregory*, supra).

C entered into an agreement with R that R should buy and sell goods on behalf of C, and that the business should be carried on as R & Co., R being paid by salary and a percentage on the profits. The business was managed by R, but C had bought goods for it. Each became bankrupt, and it was held that the book debts and stock in trade of R & Co. were joint estate of the two (*In re Rowland* vs. *Crankshaw*, 1 L. R. Chy. 421). See also *Allen* vs. *Garratt*, 30 U. C. R. 169.

The enactment here of the dissolution of a partnership by insolvency is merely the repetition of a well understood principle of English law ; see Story *on Partnership*.

When a partner in a trading company or co-partnership becomes insolvent his Assignee can make no claim on account of the separate creditors of such partner until the joint creditors of such company or co-partnership have been paid twenty shillings in the pound with interest on such debts as carry interest (Robson, 2nd Ed. 609 ; *Ex parte Reeve*, 9 Ves. 590). See notes to Sections 80, 82 & 88.

Register to be kept by Official Assignee.

41. Every Official Assignee, or Assignee appointed by the creditors, shall, in every case in which he acts as such, keep a register showing the name of each Insolvent who has made an assignment, or against whom a writ of attachment has issued, his residence, place of business, and the nature of his trade or business, the date of the assignment, or of the issue of the writ of attachment, the amount of liabilities acknowledged by the Insolvent in his schedule of liabilities, the amount of claims proved, the amount of composition, or of dividends paid, and whether a discharge has been granted within one year or not, the amount of dividends remaining unpaid after three months from the declaration of the last dividend, with such other information as the Assignee may deem of general interest with reference to each estate—which register shall be open to the inspection of the public, within office hours, at the office of such Assignee; and the Official Assignee, or the Assignee, as soon as he takes charge of any estate, shall open a separate book for each such estate, showing a debtor and creditor account of all his receipts and disbursements on account thereof.

Assignee to open separate account with each estate.

Deposit of register by non-official assignee.

And every Assignee, other than an Official Assignee, shall within one month after he shall have wound up the estate of any Insolvent, and obtained his discharge, deposit the register kept by him as aforesaid, with reference to such estate, in the office of the Official Assignee of the county or district, where it shall remain for the like purposes, and under the same provisions as the register kept by the Official Assignee.

The greater portion of this section is new. The 39th section of the Act of 1869 provided that the Assignee should keep a correct register of all his proceedings, and of the reception of all papers and documents served upon him, and of all claims made to or upon him.

Assignees under this or any former Act must obtain discharge and pay over balances to Receiver-General with sworn account.

42. Every Assignee, under this Act, shall, within thirty days after obtaining his discharge, and every Assignee under any Act hereby repealed shall within thirty days after obtaining his discharge, or the closing of his accounts as such, or within thirty days after the coming into force of this Act, if he has obtained his discharge or closed his accounts before its coming into force, pay over to the Receiver-General all moneys belonging to the estate then in his hands, not required for any purpose authorized by this Act or any Act hereby repealed, as the case may be, with a sworn statement and account of such moneys, and that they are all he has in his hands, under a penalty of not exceeding ten dollars for each day on which he shall neglect or delay such payment; and he shall be a debtor to Her Majesty for such moneys, and may be compelled as such to account for and pay over the same.

This section is new.

Assignee to be paid only by commission on amount realized.

43. The Assignee shall be entitled to a commission on the net proceeds of the estate of the insolvent of every kind, of five per cent. on the amount realized not exceeding one thousand dollars, the further sum of two and a half per cent. on the amount realized in excess of one thousand dollars and not exceeding five thousand dollars, and a further sum of one and a quarter per cent. on the amount real-

ized in excess of five thousand dollars,—which said commission shall be in lieu of all fees and charges for all his services and disbursements in relation to the estate, exclusive of actual expenses in going to seize and sell, and of disbursements necessarily made in the care and removal of property : And actual necessary disbursements.

No Assignee shall employ any counsel or attorney at law without the consent of the Inspectors, or of the creditors; but expenses incurred by employing such counsel or attorney with such consent, shall be paid out of the estate, if not recovered from any party liable therefor : As to employing counsel, &c.

The remuneration of the Official Assignee, when he is superseded by an Assignee appointed by the creditors, shall be fixed by the court or judge and taxed by the proper officer, and shall be the first charge on the estate. Remuneration of superseded Assignee.

Under the 52nd section of the Act of 1869 the remuneration of the interim assignee, guardian, and Assignee respectively were fixed by the creditors at the first meeting, or at any other meeting called for that purpose, but if not so fixed before a final dividend was declared, should be put into the dividend sheet at a rate for the interim assignee or guardian as the Assignee should deem reasonable, and for the Assignee not exceeding five per cent. upon the cash receipts.

Prior to the above the Assignee had the sole right to elect his own professional adviser, and could not be made to change him except upon reasonable ground, and then only upon the penalty of being himself removed from the office of Assignee in case of refusal (*Re Lamb*, 17 C. P. U. C. 173).

The above section as to the appointment of a solicitor follows the English Act of 1869, which empowers the creditors to designate the attorney, solicitor or counsel for the Assignee (Robson, 2nd Edition, 515).

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44. The Assignee shall call meetings of creditors whenever required in writing so to do, by the Inspectors or by five creditors or by the judge, and he Assignee to call meetings on requisition.

shall state succinctly in the notice calling any meeting the purpose thereof.

Deposit and withdrawal of moneys of estate in bank.

45. The Assignee shall deposit at interest in some chartered bank, to be indicated by the Inspectors or by the judge, all sums of money which he may have in his hands belonging to the estate, whenever such sums amount to one hundred dollars. Such deposit shall not be made in the name of the Assignee generally, on pain of dismissal, but a separate deposit account shall be kept for each estate of the moneys belonging to such estate, in the name of the Assignee and of the Inspectors (if any), and such moneys shall be withdrawn only on the joint cheque of the Assignee and of one of the Inspectors, if there be any.

Interest on deposits.

The interest accruing on such deposits shall appertain to the estate, and shall be distributed in the same manner and subject to the same rights and privileges as the capital from which such interest accrued.

Penalty for non-distribution of such interest.

If in any account or dividend sheet made subsequent to any deposit in a bank, the Assignee omits to account for or divide the interest then accrued thereon, he shall forfeit and pay to the estate to which such interest appertains, a sum equal to three times the amount of such interest; and he may be constrained so to do by the judge upon summary petition and by imprisonment as for a contempt of court.

Assignee to produce bank book at meetings, &c.

At every meeting of creditors, the Assignee shall produce a bank pass book showing the amount of deposits made for the estate, the dates at which

such deposits shall have been made, the amounts withdrawn and dates of such withdrawal, of which production mention shall be made in the minutes of such meeting, and the absence of such mention shall be *prima facie* evidence that it was not produced thereat. The Assignee shall also produce such pass book whenever so ordered by the judge at the request of the Inspectors or of a creditor, and on his refusal to do so he shall be treated as being in contempt of court.

Punishment for false entry in such pass-book.

The Assignee who shall make or cause to be made any false entry in such pass book with a view to deceive the Inspectors, creditors, or judge, shall be guilty of a misdemeanor, and shall be liable, at the discretion of the court before which he shall be convicted, to punishment by imprisonment for a term not exceeding three years, or to any greater punishment attached to the offence by any statute.

The 38th Sect. of the Insolvent Act of 1869 is re-enacted in the above.

Estate in whom vested on death of Assignee.

46. Upon the death of an Assignee or Official Assignee, or upon his removal from office, or upon his discharge, the estate shall remain under the control of the judge until the appointment of another Assignee or Official Assignee as the case may be, when the estate shall become vested in such other Assignee or Official Assignee.

Final account and discharge of Assignee.

47. After the declaration of a final dividend, or if after using due diligence the Assignee has been unable to realize any assets to be divided, the Assignee shall prepare his final account, and present

a petition to the judge for his discharge, after giving notice of such petition to the insolvent, and also to the Inspectors, if any have been appointed, or to the creditors by circular, if no Inspectors have been appointed; and he shall produce and file with such petition a bank certificate of the deposit of any dividends remaining unclaimed, and of any balance in his hands; and a statement showing the nominal and estimated value of the assets of the Insolvent, the amount of claims proved, dividing them into ordinary, privileged or secured and hypothecary claims, the amount of dividends or of composition paid to the creditors of the estate, and the entire expense of winding up the same. And the judge, after causing the account to be audited by the Inspectors, or by some creditor or creditors named by him for the purpose, and after hearing the parties, may grant conditionally, or unconditionally the prayer of such petition, or may refuse it.

Obligation of Assignee.

Power of Judge.

It is imperative under the above section that the Assignee prepare a final account and present a petition for his discharge.

An Assignee who neglects to present his petition for discharge may incur a penalty of $100. See Sec. 48.

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48. Any Assignee who neglects to present such a petition within six months after the declaration of a final dividend, or within three months after he shall have been required by the Inspectors or by any creditor of the estate, after it shall have been ascertained that there are no assets wherewith to declare a dividend, shall incur a penalty not exceeding one hundred dollars.

Penalty in case of neglect to present such petition.

(2.) The provisions of the next preceding section shall apply to all persons who have acted or are acting as Assignees under "*The Insolvent Act of* 1869," or in either of the Provinces of Quebec or Ontario under the Act formerly in force therein called and known as "*The Insolvent Act of* 1864," or any Act or Acts amending or continuing the same or either of them; and any such person who neglects to present such a petition as therein mentioned within the following delays respectively, shall incur a penalty of one hundred dollars, that is to say:— Provisions of sec. 47 to apply to Assignees under former Acts.

(*a.*) In case a final dividend has been declared before the coming into force of this Act, or in case the Assignee has been unable to realize any assets to be divided, then within three months after this Act has come into force:

(*b.*) In case a final dividend is declared after the coming into force of this Act, then within six months after the declaration of such final dividend.

COMPOSITION AND DISCHARGE.

49. If at the first meeting of the creditors, or at any time thereafter, the insolvent files with the Assignee a consent in writing to his discharge, or a deed of composition and discharge, signed by at least a majority in number of the creditors who have then respectively proved claims of one hundred dollars and upwards, or if at such first or at any subsequent meeting an offer in writing be made by the insolvent to compound with his creditors, specifying the terms and conditions of the proposed composition, and such offer be approved of by a majority in number of such creditors present at such Meeting to consider composition and discharge, how and when called.

meeting, the Assignee shall call another meeting of the creditors to take such consent or such deed or offer of composition and discharge into consideration; and in every case such deed of composition or offer of composition shall be on condition, whether the same be expressed or not, that if the same be carried out, the insolvent shall pay the costs incurred in Insolvency, including those for the confirmation of such composition.

This section differs somewhat from the 94th section of the Act of 1869, as that section, besides requiring the majority in number, required that that majority should represent *at least three-fourths in value*, but from the reading of the 52nd and 61st sections of this Act, a majority in value would still appear to be necessary. This power being statutory must be exercised *bona fide* for the benefit of all the creditors. If, therefore, there is a fraudulent bargain for the benefit of some of the creditors, or if the majority of the creditors are induced by friendly feelings towards the debtor to accept a composition greatly disproportioned to the assets, the court will hold the deed not to be binding on a non-assenting creditor; but if the assenting majority appear to have exercised their discretion *bona fide* for the benefit of the creditors, the court will not sit in review on the quantum of the composition (*In re Cowan*, L. R. 2 Chy. 563; *ex parte Roots*, 2 L. R. Chy. 559; *Jackman* vs. *Mitchell*, 13 Ves. 581; *Cockshott* vs. *Bennett*, 2 T. R. 763; *Fisher* vs. *Bridges*, 3 El. & Bl. 642). Or if the debtor has been guilty of misrepresentation and concealment as to his property (*Howden* vs. *Haigh*, 11 Ad. & E. 1033). If one creditor makes a secret bargain for an additional sum or security for himself as the condition of his accepting the composition, such bargain will not only be absolutely void, but it will entitle the other creditors to set aside the composition and resort to their original debts (*Danglish* vs. *Tennent*, L. R. 2 Q. B. 49); and such creditor will be bound by a release contained in the deed, although it be void against the other creditors (*Ex parte Oliver*, 4 De G. & Sm. 354); and it would seem that such creditor will not, if the composition be not paid and the debtor becomes insolvent, be allowed to prove under the bankruptcy for either the original debt or his composition (*Re Cross*, 4 De G. & Sm. 364).

And where a debtor obtained the consent of one of his creditors to a composition by a secret promise to pay his debt in full, which promise he

performed, and afterwards became bankrupt, the creditor was not allowed to prove a new debt without first deducting the sums so paid to him beyond the former composition (*Ex parte Minton*, 1 M. & A. 440 ; 3 D. & G. 688).

Giving up part of stock to a creditor is evidence of fraudulent preference (*In re Beare*, 3 L. J. U. C. [N. S.] 294).

Unnecessary for creditors to prove debts to enable them to execute deed (*In re Langs*, 4 L. J. U. C. [N. S.] 283).

To a plea of discharge confirmed by the judge, the plaintiff replied a corrupt agreement between the insolvent and D. & Co., parties to the deed of composition and discharge, that in consideration of executing it D. & Co. should receive an additional sum above the composition for which the insolvent gave them his note, and that the plaintiff and other creditors had no knowledge of such agreement until after the confirmation : *Held* a good answer, the confirmation not being made conclusive by the Act under such circumstances (*Thompson* vs. *Rutherford*, 27 Q. B. U. C. 205).

Where an insolvent, before the meeting of his creditors, concealed a portion of his stock : *Held* under the Insolvent Act of 1864 that his discharge was thereby avoided, and that it was not the less a fraud because he had valued his assets at a sum sufficient to cover the goods so concealed. The plaintiff therefore, though he had signed a deed of composition and the discharge had been confirmed, was held entitled to recover for his debt (*McLean* vs. *McLellan*, 29 Q. B. U. C. 548).

Declaration on a joint and several note made by defendants, payable to plaintiff : plea by two defendants, that the note was given by them as sureties for the other defendant, with notice thereof to the plaintiff, who took the same upon the express agreement that they should be liable as sureties only : that the plaintiff, while holder of the said note, without their knowledge or consent, after the accrual of the claim and before action, released the other defendant, the said release being headed as follows :—Insolvent Act of 1864, &c. : *Held* that plea bad, for the court was bound to look upon the plea as setting up a discharge under the Insolvent Act of 1864, and by section 9, sub-section 4 of that Act, the plaintiff's rights were expressly preserved to him against all other persons liable for or with the insolvent (*Fowler* vs. *Perrin et al*, 16 C. P. 258).

It is not necessary that an Assignee in Insolvency should be party to a deed of composition and discharge (*Dredge* vs. *Watson*, 33 Q. B. U. C. 165).

G. & Co. having made an assignment on 4th July, 1868, a deed of

composition and discharge, dated 8th August, was filed on the 14th Sept., 1868, not being then signed by the insolvents. It was confirmed by the county judge on 2nd December, 1868, which confirmation was reversed in March following, on the ground that the insolvents had not executed it. Afterwards in same month the insolvents executed the deed without any previous leave from the judge, and without refiling it, and they then set it up as a defence to this action previously brought on note : *Held* that the plaintiff, a non-assenting creditor, was not bound by this deed, for the members of the insolvent firm had individual creditors, and it provided only for partnership debts (*Allan* vs. *Garratt et al.* 30 Q. B. U. C. 165).

Held, 1. That a deed of composition and discharge under section 9 of the Insolvent Act of 1864, purporting to be between the majority of the creditors of $100 and upwards of the first part, and the insolvents of the second part, is valid. 2. A creditor who has accepted the terms of a deed of composition cannot afterwards contest the confirmation of the discharge. 3. The debt of a secured creditor who has elected to accept his security in full of his claim, and obtained the consent of the Assignee to such election, is not to be estimated in considering the amount of such indebtedness (*In re Lawson et al.* 5 L. J. U. C. [N. S.] 232).

A deed of composition and discharge under section 8, sub-section 4, of the Act of 1864, must be signed by the insolvent, and must provide for the separate creditors of each partner as well as those of the firm (*In re Garratt et al.* 28 Q. B. U. C. 266).

A deed of composition and discharge made without any proceedings in insolvency, without any Assignee being appointed, and apparently wholly outside the Insolvent Court, cannot be a bar to non-assenting creditors (*Green* vs. *Swan*, 22 C. P. U. C. 307).

An insolvent having compounded with his creditors and had his goods restored to him, resumed business with the knowledge of his Assignee and creditors. It was subsequently ascertained that he had been guilty of a fraud which avoided his discharge, whereupon he absconded, and an attachment under the Insolvent Act of 1869 was sued out against him by his subsequent creditors : *Held* that they were entitled to be paid out of his assets in priority to the former creditors (*Buchanan* vs. *Smith*, 17 Grant, 208. Affirmed on rehearing, S. C. 18 Grant, 41).

Declaration on common counts, plea an assignment under the Insolvent Act of 1869, to an Official Assignee.

Replication : That before action the Assignee, in conformity with a deed of composition, transferred the estate to the plaintiff. Rejoinder : That after

the deposit of the deed of composition and discharge with the Assignee by the plaintiff, that the Assignee did not immediately give notice of such deposit, as required by the Act : *Held* on demurrer : That rejoinder good, for by the statute the giving of such notice is a condition precedent to the reconveyance by the Assignee (*Nicholson* vs. *Gunn*, 35 Q. B. U. C. 7).

An antecedent debt in respect of which an insolvent has duly received his discharge under the Insolvent Acts of 1864 and 1869, is a continuing debt in conscience, and sufficient consideration for a new promise to pay it (*Austin* vs. *Gordon*, 32 Q. B. U. C. 621).

When creditors are called upon to accept a composition, they are entitled to know where the goods and money entrusted to the debtor are gone, and to what cause the loss is to be attributed (*Hood* vs. *Dodds*, 19 Grant, 639).

A person who carried on business in partnership executed a composition deed for the benefit of his separate creditors only, which was assented to by the requisite statutory majority of separate creditors. The firm was also indebted, and it was held that the deed was not binding on a dissenting separate creditor, for it should have provided for all classes of the insolvent's creditors (*Ex parte Glen*, 2 L. R. Chy. 670; *Telby* vs. *Wanless*, 2 L. R. Ex. 21 and 275).

A deed of composition made between the members of a partnership and the joint creditors of the firm, without any reference to the separate creditors of the different members of the firm, is invalid (*Tomlin* vs. *Dutton et al.* 3 L. R. Q. B. 466).

Where a non-assenting creditor sues a debtor who has executed a composition deed containing a release for a debt due before the execution of the deed, and the debtor neglects to plead the release, he is estopped from setting it up to defeat the execution (*Rossi* vs. *Bailey*, 3 L. R. Q. B. 621).

An unreasonable provision in a composition deed will render it invalid against non-assenting creditors (*Baldwin* vs. *Pell*, 10 L. T. Rep. [N. S.] 493 ; *Armitage* vs. *Baker*, 10 L. T. Rep. [N. S.] 526).

A composition deed by which the creditors are entitled to the composition only on signing is bad (*Martin* vs. *Gribble*, 13 W. R. 691). As to the effect of composition deed to bind non-assenting creditors, and as to what are reasonable conditions in such deeds (see *Briarlot* vs. *Mills*, L. R. 1 Q. B. 104 ; *Bond et al* vs. *Weston*, L. R. 1 Q. B. 169 ; *Gresty* vs. *Gibson*, L. R. 1 Ex. 112 ; *Reves et al* vs. *Watts*, L. R. 1 Q. B. 412 ; *Coles* vs. *Turner*, L. R. 1 C. P. 373 ; *Brooks* vs. *Jennings* L. R. 1 C. P. 476 ; *Blumberg* vs. *Rose*, L. R. 1 Ex. 232 ; *Greenberg* vs. *Ward*, L. R. 1 C. P. 585 ; *Jacobson* vs. *Lambert*, L. R. 2 Ex. 294 ; *McLaren* vs. *Baxter*, 2 L.

R. C. P. 559 ; *Isaacs* vs. *Green*, 2 L. R. Ex. 352 ; *Bailey* vs. *Bowen*, 3 L. R. Q. B. 133 ; *FitzPatrick* vs. *Bourne*, 3 L. R. Q. B. Ex. 233 ; *Sowrey* vs. *Law*, 3 L. R. Q. B. 281.)

As to what are unreasonable provisions (see *Giddings* vs. *Penning*, 1 L. R. Ex. 325 ; *Latham* vs. *Lafone*, 2 L. R. Ex. 115 ; *Baker* vs. *Painter*, 2 L. R. C. P. 492 ; *Oldis* vs. *Armston*, 2 L. R. Ex. 406 ; *Wigfield* vs. *Nicholson*, 3 L. R. Q. B. 450.)

A complete surrendering over of the assets is not indispensable to the validity of a deed of composition as against non-assenting creditors (*Ex parte Morgan*, 7 L. T. R. [N. S.] 730 ; and *Ex parte Rawlings*, 7 L. T. R. [N. S.] 582.

And see *in re Smith*, 4 P. R. 89, C. L. Cham. ; *in re Wallis et al*, 29 Q. B. 313 ; *in re Thomas*, 15 Grant, 196 ; *Hood* vs. *Dodd*, 19 Grant 639 ; *Martin* vs. *Brunell et al*, 4 P. R. 229 ; *Shaw* vs. *Massie*, 21 C. P. U. C. 266 ; *Dredge* vs. *Watson*, 33 Q. B. U. C. 165 ; *Davidson* vs. *Perry*, 23 C. P. U. C. 346 ; *in re Waddell*, 2 L. J. U. C. [N. S.] 242 ; *Ex parte Wilmott, in re Thompson*, 2 L. R. Chy. 795 ; *Haggarth* vs. *Taylor*, 2 L. R. Ex. 105 ; *Sharland* vs. *Spence*, 2 L. R. C. P. 456 ; *Robertson* vs. *Goss*, 2 L. R. Ex. 396 ; *Kitchen* vs. *Hawkins*, 2 L. R. C. P. 22 ; *Kent* vs. *Tompkinson*, 2 L. R. C. P. 502 ; *Marsh* vs. *Higgins*, 19 L. J. C. P. 297 ; *Waugh* vs. *Middleton*, 8 Ex. 352 ; *Larpent* vs. *Biby*, 24 L. J. Q. B. 301 ; *Lancaster* vs. *Ellice*, 31 L. J. Chy. 789. For form of deed of Composition and discharge see Form 5, and for form of Confirmation of discharge see 5 A.

Notice of meeting.

50. Such meeting shall be called by at least one advertisement published in the Official Gazette stating the time, place and object of the meeting, and also by letter or card postpaid addressed by mail, at least ten days before the meeting, to each of the creditors mentioned in the list of creditors furnished by the insolvent, and to all other creditors who may have proved their claims, although not mentioned in the said list, indicating in substance, in addition to the time, place and object of the meeting, the terms and conditions of the proposed composition and discharge : and such meeting shall not take

place less than fifteen days after the first publication of the said advertisement.

This section is new.

Discharge may be approved or not.

51. The creditors present at the meeting to take into consideration the proposed discharge, or composition and discharge, may by resolution to that effect express their approval thereof or dissent therefrom; and any creditor may at any time before or during the said meeting, file with the Assignee his objections in writing to the proposed discharge or composition and discharge.

This section is new. The 97th section of the Insolvent Act of 1869 merely provided that on the deed of composition being deposited with the Assignee, he was to give immediate notice of the same by advertisement. And if no opposition was made within three days after the last publication of the notice the Assignee was required to act on such deed according to its terms.

Proceedings when consent is obtained.

52. If at the close of the meeting or at any time thereafter the insolvent has obtained the assent to his discharge or to the proposed composition and discharge, of a majority in number of his creditors who have proved claims to the amount of one hundred dollars and upwards, and who represent at least three-fourths in value of all the claims of one hundred dollars and upwards, which have been proved, the Assignee shall annex to the deed or consent to a discharge, or to the deed or offer of composition and discharge a certificate to that effect, in which he shall state the total number and total amount of claims of one hundred dollars and

Certificate and what it shall contain.

upwards which have been proved, the number of creditors who have given their written assent to the discharge or to the proposed composition and discharge of the insolvent, and the amount of proved claims of one hundred dollars and upwards which they represent. The Assignee shall further annex to such certificate a copy of any resolution adopted at the meeting of creditors in reference to the discharge, or to the proposed composition and discharge, and all the objections which may have been filed with him to such discharge or composition and discharge, together with a certificate as to the amount of claims of the creditors who shall have agreed to or opposed such resolution, or who may have filed objections in writing to such discharge or proposed composition and discharge, indicating the amount of such claims of one hundred dollars and upwards which have been proved, and whether from their nature they will be affected by the proposed discharge or composition and discharge.

Further certificate.

Probable ratio of dividend to be stated.

The Assignee shall further state in such certificate the ratio of dividend actually declared and likely to be realized out of the estate for the unsecured creditors, and shall, without delay, transmit such certificate to the clerk or prothonotary of the court in the county or district wherein the proceedings are carried on.

The above section is new. The formalities required are such as will prove great safeguards against confirmations being improvidently granted, as the certificates required will place the judge in possession of all desired information in regard to the insolvent's estate, and the views which the creditors entertain of the manner in which he has been conducting his business. This information, which will be contained in the required certificates, will also greatly facilitate the examination of the insolvent before

the judge, on his application for a confirmation of the deed of composition and discharge.

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53. An insolvent who has procured a consent to his discharge, or the execution of a deed of composition and discharge, and the certificate of the Assignee, within the meaning of this Act, may file in the office of the court the consent or deed of composition and discharge, with such certificate annexed, and may then give notice (Form J) of the same being so filed and of his intention to apply by petition, to the Court in the Provinces of Quebec and Nova Scotia, or in the Provinces of Ontario, New Brunswick, Prince Edward Island, British Columbia and Manitoba (and in Nova Scotia, when county judges are appointed there), to the judge, on a day named in such notice (which, however, shall not be before the day on which a dividend may be declared under this Act), for a confirmation of the discharge effected thereby; and such notice shall be given by one advertisement in the Official Gazette, and also by letter or card, postpaid, addressed to each of the creditors, by mail, at least one month before presenting the petition to the court or judge; and upon such application, any creditor of the insolvent, or the Assignee under the authority of the creditors, may appear and oppose such confirmation.

Application for confirmation of discharge.

Notice.

Notice, how given.

Opposition allowed.

As to grounds for opposing such confirmation, see notes to section 56 infra.

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54. If it appears that all the notices and formalities required by law have been given and ob-

Confirmation of discharge.

served, and that no objections have been made to the proposed discharge or composition and discharge, the court or judge may without further notice and on the petition of the insolvent confirm his discharge or the proposed composition and discharge; but in case it appears that objections have been made to such discharge or composition and discharge, the application of the insolvent shall not be heard until at least three days' notice shall have been given of the same by the insolvent to the Assignee, the Inspectors and to the creditors who shall have objected to the said discharge, or proposed composition and discharge.

A consent to a discharge of an insolvent is operative even without an assignment, provided the insolvent makes and files an affidavit that he has no estate to assign (*In re Perry* 2 L. J. [N. S.] 75).

A discharge under the Insolvent Act does not prevent a party from being committed on a judgment summons, under the Division Court Acts. If it did, a party applying for protection from arrest should show clearly that the name of the plaintiff was in his schedule, and this is not sufficiently done by putting in a copy of the schedule, without swearing that the plaintiff's name is there (*In re Mackay et al.* vs. *Goodson*, 27 Q. B. 263).

Affidavit by insolvent to be produced.

55. The court or judge shall not confirm the discharge or proposed composition and discharge of the insolvent, unless he shall have produced with his application an affidavit in the Form K, showing that no one of the creditors who have signed the same has been induced to do so by any preferential payment, promise of payment or advantage whatsoever made, secured or promised to him by or on behalf of the insolvent, and a certificate from the Assignee that he has delivered a sworn statement of his liabilities and assets as required by this Act.

This section is new.

56. The insolvent shall not be entitled to a confirmation of his discharge or of a deed of composition and discharge if it appears to the court or judge that he has not obtained the assent of the proportion of his creditors in number and value required by this Act to grant such discharge or enter into such deed of composition and discharge, or that he has been guilty of any fraud or fraudulent preference within the meaning of this Act, or of fraud or evil practice in procuring the consent of the creditors to the discharge, or their execution of the deed of composition and discharge, as the case may be, or of fraudulent retention and concealment of some portion of his estate or effects, or of evasion, prevarication or false swearing upon examination as to his estate and effects, or that the insolvent has not kept an account-book shewing his receipts and disbursements of cash, and such other books of account as are suitable for his trade, or that if, having at any time kept such book or books, he has refused to produce or deliver them to the Assignee, or is wilfully in default to obey any provision of this Act or any order of the court or judge; but in the Provinces of Ontario and Quebec, the omission to keep such books before the coming into force of the Insolvent Act of 1864, and in the Provinces of New Brunswick and Nova Scotia, such omission previous to the coming into force of the Insolvent Act of 1869, and in the Provinces of British Columbia, Prince Edward Island or Manitoba, such omission previous to the coming into force of this Act, shall not be a sufficient ground for refusing the confirmation of the discharge of an insolvent:

When insolvent shall not be entitled to confirmation of discharge.

Proper books must have been kept.

Proviso as to certain Provinces.

Proviso as to fraud and fraudulent preferences.

And provided further that any act on the part of the insolvent, which might be held to be an act of fraud or fraudulent preference within the meaning of the Insolvent Act of 1864 or of 1869, or of this Act, but which would not amount to fraud if the said Acts or this Act had not been passed, shall not be a ground for refusing the confirmation of the discharge of any insolvent, if such act was done by the insolvent, in the Province of Ontario or Quebec, before the coming into force of the Insolvent Act of 1864, or in the Province of Nova Scotia or New Brunswick before the coming into force of the Insolvent Act of 1869, or in the Province of British Columbia, Prince Edward Island or Manitoba, before the coming into force of this Act.

The judge in insolvency refused an insolvent his discharge, on the grounds—1. That he had made a preferential assignment in 1857; 2. Had kept no books of account showing receipts and disbursements of cash, and other books suitable for his trade (*In re Parr*, 17 C. P. 621).

It appeared on an application by an insolvent for his discharge under the Insolvent Act of 1864 that he had, within three months before his assignment, paid one of his creditors in full under such circumstances as was considered to amount to a fraudulent preference, and had neglected to keep proper cash books or books of account suitable to his trade. The county judge granted a discharge suspensively, to take effect four months after the order (*in re Lamb*, 4 P. R. 16 C. L. Cham).

The requirements of the Act on debtors asking for their discharge should be peremptorily insisted on; *ib.*

Held that the facts set forth in this case, though unfavourable to the insolvent, were distinguishable from acts or other misconduct constituting fraud, and that unless the latter be shewn, the insolvent is entitled to the benefit of the statute (*in re Smith*, 4 P. R. 89 C. L. Cham).

The mere fact of a person in insolvent circumstances not defending one action and defending, and thus delaying, another, is not illegal by common law; but under the Insolvent Act it is fraud for an insolvent to cause his goods to be taken in execution to the prejudice of his general

creditors, even though the preferred claim be a just one. It was not decided whether this would avoid the judgment ; but, if not, it was nevertheless an act of fraud, for which some punishment should be awarded, though not necessarily to the extent of a perpetual refusal of the insolvent's discharge (*In re Jones* infra).

The insolvent had the possibility of an interest under a will, which was omitted from his schedule of assets as being of no value : *Held* that this omission was not an act of fraud (*in re Jones*, 4 P. R. 317, C. L. Cham).

Gambling by a person who subsequently claims the benefit of the Act is not fraud within the meaning of the Act of 1864, and queried whether gambling is a fraud at all under this Act ; *ib.*

Discharge refused where, because assignment had not been made to the Assignee where insolvent carried on business, and was not in duplicate and insolvent had kept no proper books of account (*in re Sullivan*, 5 L. J. U. C. [N. S.] 71).

A purchase of goods by persons unable to pay their debts in full is not fraudulent within section 8, or a reason for refusing the discharge unless such inability is concealed from the creditor with intent to defraud him (*in re Garratt et al*, 28 Q. B. U. C. 266).

Fraud in contracting debts before the Act of 1864 is not to be excluded from consideration on an application to confirm the discharge (*in re Owens*, 12 Grant 560).

Where a trader whose property was heavily mortgaged and had large overdue debts which he could not pay, obtained credit from Montreal merchants, concealing his true position, alleging that he was worth $4000 more than he owed, and that he had no engagements he could not meet. This was held such a fraud as disentitled him to a discharge ; *ib.*

A trader having discovered that he could not pay in full continued his business in hope, which was not shewn to be absurd or unreasonable, that he would thereby be enabled to do so, and in course of business so continued, contracted some new debts, but was unsuccessful and found it necessary to assign : *Held* that he was not thereby disentitled to his discharge (*in re Holt et al*, 13 Grant 568). In such case it may or may not be his duty to discontinue his trade according to circumstances. Continuing it may be fraud but it is not necessarily so ; *ib.*

The absence of any satisfactory statement how it came that a credit balance of $15,000 a short time before the insolvency was turned into a debit of nearly $13,000 ; the loan of $1700 by the insolvent to his brother to carry on a business which failed, and which was carried on without capital ; the receipt of $1250 by the insolvent a few months

before his insolvency, without any reasonable account of what had become of it were considered to be circumstances which showed that the insolvent was not entitled to his final certificate (*Hood* vs. *Dodds*, 19 Grant 639).

A discharge will not be granted if insolvent has neglected to keep proper books (*in re Beare*, L. J., Ont., for 1867, page 295).

The following decisions which have been rendered in Montreal on contestation of applications for discharge under the Act of 1864, may partly serve to illustrate this section :

In re Alex. Thurber vs. *Law, Young & Co.* contesting. Thurber applied for confirmation of his discharge. Law, Young & Co. and other creditors contested it on the following grounds :

1st. That Insolvent was bankrupt to his own knowledge in 1863, and was so continuously up to his assignment in May, 1865.

2nd. That he had been guilty of making fraudulent preferences. *Per curiam* (Monk J.)—In the first place it is alleged that the insolvent had made several purchases in contemplation of bankruptcy. He had been doing business in Montreal for several years past. He had evidently no knowledge of book-keeping. On the 30th December, 1863, he took stock. At that time he considered himself to be perfectly solvent. But the balance sheet showed that his solvency depended upon a great many outstanding debts which could not be considered of much value. He had little or no capital, but nevertheless his transactions were very large. During 1864 and 1865 he made purchases from Messrs. Law, Young & Co. and other parties, and the first pretention is that he made these purchases knowing that he was insolvent and in fraudulent contemplation of bankruptcy. Further, that in 1865, when on the very verge of bankruptcy, he credited his wife with $3,000, with interest. It must be confessed this had a suspicious look, as well as the circumstance that he made no balance sheet in 1864. Yet I do not find in these circumstances sufficient evidence to justify me in thinking that at the time Thurber knew himself to be insolvent. During the time he was making these purchases he was borrowing money at heavy interest from brokers, and obtaining large discounts from the banks. He appears all the time to have believed he could pull through. The $3,000 credited to his wife was done at the suggestion of his book-keeper. It must be further borne in mind that two-thirds of his creditors had consented to his discharge. This was a fact which should have considerable weight. There was another fact : a note of his for upwards of $3,000 was coming due on the 15th May. Three days previously he went to the bank and offered $2,000. The bank said they would not take the $2,000, but they would hold the note over

for a few days. He appears to have struggled hard to maintain his credit. This did not look like the conduct of a man about to make a fraudulent bankruptcy. The court could not, in view of all these circumstances, go to the extent of saying that he was aware of and made these purchases in contemplation of insolvency.

The second ground urged was fraudulent preferences. He did not consider that the payments to brokers a few days before his declaration of insolvency amounted to fraud sufficient to refuse the application for a confirmation of his discharge (11 L. C. Jur. 45).

In *re Tempest* and *Duchesnay et al.* contestants. The judgment in this case arose on an application for discharge by Tempest, which Duchesnay and other creditors refused. The creditors had given no discharge to the applicant, and after the delay of one year from the date of the assignment he applied for it from the court. The contestation alleged :

1. A fraudulent retention of moneys belonging to the estate.

2. That the firm in which the insolvent had been a partner had purchased goods on credit, knowing themselves at the time to have been insolvent, and concealing the fact from the vendors.

3. That the firm had given fraudulent preferences.

A statement of the circumstances on which these charges were based would exceed the space at our command. The legal points decided by the contestation must suffice for the present purpose. They are as follows :

1. That he who buys goods on credit implicitly assures the vendor, if not of the actual sufficiency of the assets to meet his liabilities, at least that there is a reasonable probability of such sufficiency.

2. That while the vendor on credit takes the risk of the subsequent insolvency of the debtor, he is not supposed to contemplate the escape of the bankruptcy of the debtor by reason of a state of insolvency actually existing at the time of his purchase.

3. That where a party buys goods on credit knowing his affairs to be in a bad state, although he may have no intention of defrauding the vendor, yet in the eye of the law he does a wrong, and having subsequently declared his insolvency, the court will be justified in suspending his discharge for a period under its discretionary power (11 L. C. Jur. 5).

In re William M. Freer and *Gilmour et al.* contesting. In this case Freer had assigned in February, 1867. On 26th of March, 1868, he petitioned for his discharge under the Act of 1864, and alleged that he had failed to obtain the requisite number of creditors to consent to a discharge, and therefore asked it from the court. This application was contested by Gilmour & Co. on the ground of fraud.

In evidence it appeared that Freer, as a partner in the firm of Freer, Boyd & Co., purchased from contestants on 28th January, 1867, fifty-five barrels of potash strictly for cash, and valued at $2,103.11. On the 29th Freer took delivery, and said he would check the account, and about 1 P. M. on that day he would pay the price. The contestants' agents, after repeated demands for the money, failed to obtain it, the insolvent making various excuses and promises. On the 4th of February, six days after the delivery of the potash, Freer said he had failed. It further appeared that he had sold and been paid for the potash on the 31st January.

On these facts the court (Torrance, J.) held that the insolvent had been guilty of fraud within the meaning of the Act, and his discharge was accordingly suspended for five years (See 12, L. C. Jur. 315).

The same judge in October term (1869) suspended a discharge for two years on the grounds of reckless trading, selling goods below cost, and not keeping proper books (*Ex parte Tessier* vs. *Martin et al.* contesting, Popham).

Powers of Court or Judge.

57. The court or judge as the case may be, upon hearing the application for confirmation of such discharge, the objections thereto, and any evidence adduced, shall have power to make an order either confirming the discharge or annulling the same according to the effect of the evidence so adduced.

In certain cases character of discharge may be modified.

—But if such evidence should be insufficient to sustain any of the grounds hereinbefore detailed as forming valid grounds for contesting such confirmation, but should nevertheless establish that the insolvent has been guilty of misconduct in the management of his business, by extravagance in his expenses, recklessness in endorsing or becoming surety for others, continuing his trade unduly after he believed himself to be insolvent, incurring debts without a reasonable expectation of paying them (of which reasonable expectation the proof shall lie on him, if such debt was contracted within thirty days of the demand made of an assignment or for the

issue of a writ of attachment), or negligence in keeping his books and accounts; or if such facts be alleged by any contestation praying for the suspension of the discharge of the insolvent, or for its classification as second class, the court or judge may thereupon order the suspension of the operation of the discharge of the insolvent for a period not exceeding five years, or may declare the discharge to be of the second class, or both according to the discretion of the court or judge.

May be suspended or made second class.

This section is a re-enactment of the 103rd section of the Act of 1869.

By the English Bankruptcy Act of 1849 certificates of conformity were divided into three classes, which were awarded according to the deserts of the bankrupt. The first class contains a declaration that the bankruptcy arose from unavoidable losses and misfortunes, the second class a declaration that the bankruptcy had not arisen wholly from unavoidable losses and misfortunes, and the third class a declaration that the bankruptcy had not arisen from unavoidable losses or misfortunes. The certificates of each class, however, had the same effect of discharging the bankrupt from his debts. The commissioners were also empowered, in certain cases, to suspend or refuse a certificate, or to annex to it special conditions. By the English Act of 1861, the classification of certificates were abolished, and by the English Act of 1869, a creditor could not obtain discharge without the consent of his creditors, unless his estate paid ten shillings in the £, or would be sufficient for that purpose but for the negligence of the trustee.

The Insolvent Act of 1864, followed the English Act of 1861, in that there were no classification of certificates of discharge or meritorious or degrading distinctions whatever; and although a discharge might be granted conditionally or suspensively, yet when the condition was fulfilled or the suspension had expired, all orders of discharge possessed the same value.

An order of discharge may be granted subject to any condition touching any salary, pay, emoluments, profits, wages, earnings or income which may afterwards become due to the bankrupt, and touching after acquired property of the bankrupt (*Re Anderson*, 6 L. T. Rep., [N. S.], 837, Bank., *re Newman*, 6 L. T. Rep. [N.S.], 665, Bank). It seems that it is not in

the discretionary power of the court, to refuse or suspend the order of discharge, when the bankrupt has not been guilty of conduct amounting to a fraud under this Act (*Ex parte Udall re Mew*, 6 L. T. Rep. [N.S.], 732, ch. on appeal. *Ex parte Glass* and *Elliott*, *Re Boswell* 6 L. T. Rep. [N. S.], 407). Much the same effect as a refusal of a discharge has been obtained in England by an adjournment of a debtor's examination, *sine die* (*Re Parsons*, 6 L. T. Rep. [N.S.], 61 Bank. Irish). A discharge cannot be refused because applied for to get rid of damages in an action of seduction (*Ex parte Crabtree*, *Re Taylor*, 10. L. T., Rep. [N.S.], 361), nor does the fact of damages and costs being recovered against a Bankrupt in an action for breach of promise of marriage, afford any ground for opposition to his discharge (*Re Pearse*, 9 L. T., Rep. [N. S.], 349.)

As to a discharge under the Canadian Act, without the express consent of the creditor to any debt due as damages for seduction. See section 63. post.

If dividend is less than 33 per cent discharge may be refused or suspended.

58. Whenever it appears that the estate of the insolvent has not paid or is not likely to realize for the creditors a dividend of thirty-three cents in the dollar on the unsecured claims, and sufficient account is not given for the deficiency, the court or judge may, in its or his discretion, suspend or refuse altogether the discharge of the insolvent.

This section is new. The English Act of 1869 provided that the debtor should not be entitled to a discharge without the consent of his creditors, unless his estate paid 10 shillings on the pound.

Deed of Composition may be conditional.

59. A deed of composition and discharge may be made under this Act either in consideration of a composition payable in cash, or on terms of credit, or partially for cash and partially on credit; and the payment of such composition may be secured or not, according to the pleasure of the creditors signing it; and the discharge therein contained may be absolute, or may be conditional upon the condition

of the composition being satisfied; but if such discharge be conditional upon the composition being paid, and the deed of composition and discharge therein contained should cease to have effect, the Assignee shall immediately resume possession of the estate and effects of the insolvent in the state and condition in which they shall then be; provided always, that the title of any *bona fide* purchaser of any of the assets of the estate shall not be impaired or affected by this section; but the creditors holding claims which were provable before the execution of such deed, shall not rank, vote or be computed as creditors concurrently with those who have acquired claims subsequent to the execution thereof, for any greater sum than the balance of composition remaining unpaid; but after such subsequent creditors have received dividends to the amount of their claims, then such original creditors shall have the right to rank for the entire balance of their original claims then remaining unpaid, and shall be held for all purposes for which the proportion of creditors in value require to be ascertained, to be creditors for the full amount of such last mentioned balance.

If condition be not fulfilled.

Rank of creditors thereafter.

This section is similar to the 95th section of the Act of 1869.

An insolvent compounded with his creditors and had his goods returned to him; he thereupon resumed his business with the knowledge of his Assignee and creditors, and contracted new debts. It was subsequently discovered that he had been guilty of fraud which avoided his discharge, whereupon he absconded and an attachment was issued out against him by his subsequent creditors: *Held*, that they were entitled to be paid out of his assets in preference to his former creditors (*Buchanan* vs. *Smith*, 17 Grant 208; affirmed on appeal, 18 Grant 41; see *Tucker* vs. *Hernaman*, Sma. & Giff. 394, 4 De G. M. & G. 395]; *White* vs. *Garden*, 10 C. B. 919; *Stevenson* vs. *Newnham*, 13 C. B. 285; *Pease* vs. *Gloahe*, L. R. 1 P. C. 219).

Deed of reconveyance by Assignee to Insolvent.

60. So soon as a deed of composition and discharge shall have been executed as aforesaid, it shall be the duty of the Assignee to re-convey the estate to the insolvent; and the re-conveyance by the Assignee to the Insolvent or to any person for him, or whom he may appoint, of any part of his estate or effects, whether real or personal, if made in conformity with the terms of a valid deed of composition and discharge, shall have the same effect (except as the same may be otherwise agreed by the conditions of such deed or re-conveyance) as if such property had been sold by the Assignee in the ordinary course, and after all the preliminary proceedings, notices and formalities herein required for such sale; and if such deed of composition and discharge be contested, and pending such contestation, the judge may suspend any payment or instalment of the composition falling due under the terms of such deed; and the deed of re-conveyance need not contain any further or more special description of the effects and property re-conveyed, than is required to be inserted in the deed of assignment, and may be enregistered in like manner and with like effect; and such deed may be executed before witnesses or before notaries, according to the exigency of the law of the place where such deed of composition and discharge is to be executed.

Its effect.

If deed of composition be contested.

Form of deed.

This section is similar to the 96th section of the Act of 1869.

Effect of confirmation of discharge, what claims affected.

61. The confirmation of the discharge of a debtor in the manner herein provided shall absolutely free and discharge him, after an assignment, or after his estate has been put in compulsory liquidation, by

the issue of a writ of attachment, from all liabilities whatsoever (except such as are hereinafter specially excepted) existing against him and proveable against his estate, whether the same be secured in part or in whole by any mortgage, hypothec, lien or collateral security of any kind or not, which are mentioned or set forth in the statement of his affairs exhibited at the first meeting of his creditors, or which are shewn by any supplementary list of creditors furnished by the insolvent, previous to such discharge and in time to admit of the creditors therein mentioned obtaining the same dividend as other creditors upon his estate, or which appear by any claim subsequently furnished to the Assignee; whether such debts be exigible or not at the time of his insolvency, or be contested in whole or in part, or be dependent on certain conditions or future contingency, and whether the liability for them be direct or indirect; and if the holder of any negotiable paper is unknown to the insolvent, the insertion of the particulars of such paper in such statement of affairs or supplementary list, with the declaration that the holder thereof is unknown to him, shall bring the debt represented by such paper, and the holder thereof, within the operation of this section.

Holders of negotiable paper unknown to Insolvent.

This section is similar to the 98th sec. of the Act of 1869. A consent to a discharge of an insolvent is operative even without an assignment, provided the insolvent makes and files an affidavit that he has no estate or effects to assign (*Re Perry*, 2 L. J. U. C. [N. S.] 75).

The court set aside with costs a *Fi. Fa.* lands issued on 7th June, 1865, and renewed from time to time until 4th June, 1867, in a case where a defendant obtained his discharge.

On 30th March, 1867, plaintiff had proved his claim for full amount of

the judgment in the insolvent court, and had never attempted to take any proceedings under the writ, which he refused to withdraw although requested to do so (*Dickinson* vs. *Bunnell*, 19 C. P. U. C. 216).

To an action for attorney's costs, defendant pleaded his discharge under the Act of 1864, alleging that plaintiff's name and residence, with a statement of defendant's indebtedness to him, being for a balance of costs in two suits specified, were stated in his schedule filed, and that he was not aware before obtaining his discharge of the exact amount of such indebtedness. The plaintiff replied that his name was not mentioned in the schedule for any sum or amount whatever: *Held*, on demurrer, that the debt due to the plaintiff was sufficiently stated in the schedule (*Cameron* vs. *Holland*, 22 Q. B. U. C. 506). The statute is substantially complied with if the debt is set out in such a manner as cannot mislead (*ib.*).

A creditor, although not named in the schedule annexed to the assignment, may oppose the confirmation of discharge. The insolvent should be present when the application is made for discharge (*In re Stephenson*, 1 L. J. U. C. [N. S.] 52).

In an action on a promissory note, with a plea of discharge under the Insolvent Act, and replication that the discharge was obtained by fraud, defendant having concealed from Assignee certain promissory notes. It appeared from his own evidence that defendant, several months before his assignment, which was voluntary, desiring to raise money on his farm, one-fifth of which belonged to his wife, the value of her interest not being stated, gave his wife at least $300 of notes of a third person, she otherwise refusing to consent to a mortgage of the farm. It further appeared that the defendant had attempted to collect the notes, as he alleged, for his wife, and that the mortgage had been nearly paid off, but by what means was not shown: *Held* that the plaintiff was on this evidence entitled to recover (*Golloghley* vs. *Graham*, 22 C. P. U. C. 226).

To an action on a promissory note and on the common money counts, defendant pleaded: 1. That after making note he became insolvent, and that a deed of composition was executed by a majority of his creditors, whereby he was discharged, which discharge was duly confirmed. 2. That after making note defendant became insolvent, and duly assigned to an Official Assignee, and duly set forth plaintiff's claim, which plaintiff duly proved, after which a majority in number of creditors discharged defendant, which was duly confirmed.

Replication to first plea setting out, acknowledging receipt from Assignee of certain promissory notes endorsed for certain amounts and payable at certain dates, accepting same on payment, and stating that the

creditors there named, of whom plaintiff was not one, duly discharged defendant. Replication to second plea, that the alleged consent in writing was a deed of composition and discharge in above replication set out, and that in pursuance of said deed said Assignee restored defendant his estate. Replication on equitable grounds, that the composition was not made in good faith, nor for as large amount as it should have been, as defendant well knew : *Held* on demurrer that the replications to the first and second pleas were good, the deed of composition as set out being insufficient, and that the first plea was bad : *Held* also that the equitable replication was bad (*Shaw* vs. *Massie*, 21 C. P. U. C. 266).

In August, 1872, the plaintiff issued a *fi. fa.* against defendant's lands, a portion of which defendant, in November, sold to one K. On the 1st of May, 1873, defendant made an assignment in insolvency, and on the 31st obtained a deed of composition and discharge from the necessary proportion of his creditors. On the 12th of August this was confirmed by the county court judge, and on the 15th of August defendant's estate was reconveyed to him.

The plaintiff was one of the duly scheduled creditors, but took no part in the insolvency proceedings, and although requested to remove his writ refused to do so, and advertised the lands for sale, contending that the sale to K was a withdrawal of those lands from the defendant's assets : *Held* that the plaintiff's debt was discharged by the insolvency proceedings ; that the fact of sale to K could not alter the plaintiff's position, and that his only remedy was under the composition and discharge. The proceedings on the *fi. fa.* after the assignment were set aside (*Davidson* vs. *Perry*, 23 C. P. U. C. 346).

To an action of covenant in a mortgage to pay money, defendant pleaded that, becoming insolvent after the execution of the mortgage, he made an assignment ; that plaintiff's name was known as that of Wood estate, and was so described in the schedule submitted to the Assignee and creditors ; that the plaintiff resided abroad, and was represented in Canada by M, who had notice of the appointment of said Assignee ; that on the expiry of a year defendant obtained his discharge absolutely, by which he was discharged from plaintiff's claim. Replication that order for discharge was made before the 1st of September, 1869, and that the plaintiff's name was not mentioned as a creditor in any schedule, and his claim was never proved against defendant's estate. Rejoinder, that plaintiff's claim was known as that of the Wood estate, plaintiff representing and being entitled to that estate, and was so entered in the schedule filed by the defendant with the Assignee, and that plaintiff was represented by M, who

had notice: *Held*, on demurrer, rejoinder good (*King* vs. *Smith*, 19 C. P. U. C. 319, distinguished *Farrell* vs. *O'Neill*, 22 C. P. U. C. 31. And see notes to Section 49).

Plea to a promissory note, an absolute discharge duly obtained under the Act from the judge from plaintiff's and all other debts. Replication, that plaintiff's name as a creditor and the said note and cause of action were not mentioned in defendant's schedule, annexed to his assignment, nor in any supplementary schedule, as required by law, and the debt was never proved against the estate: *Held* on demurrer that replication good. That it is still necessary, under the Insolvent Acts, to have a schedule of creditors prepared or annexed to the deed of assignment, and that the effect of a discharge under the Insolvent Act of 1864, by an insolvent, is limited to the debts and causes of action set forth in his schedule, either originally or by supplement (*King* vs. *Smith*, supra. See *Burrowes et al.* vs. *Blaquire*, 34 Q. B. U. C. 498).

As to debts which are not extinguished by discharge, see Section 63 and notes.

Discharge not to affect secondary liabilities.

62. A discharge under this Act, whether consented to by any creditor or not, shall not operate any change in the liability of any person secondarily liable to such creditor for the debts of the insolvent, either as drawer or endorser of negotiable paper, or as guarantor, surety or otherwise, nor of any partner or other person liable jointly or severally with the insolvent to such creditor for any debt; nor shall it affect any mortgage, hypothec, lien or collateral security held by any creditor as security for any debt thereby discharged, without the consent of such creditor.

This section is similar to the 99th Section of the Act of 1869. The words "without composition" are omitted from this section, and the words at the end of this section "without the consent of such creditor" are added.

Declaration on a joint and several promissory note made by the defendant, payable to plaintiff. Plea by two defendants, that the note was

made by them as sureties for the other defendant of which plaintiff had notice, and that he took the same on the agreement that they should be liable as sureties only. That the plaintiff, while holder thereof without their knowledge or consent by deed, released the other defendant, which release was headed "Insolvent Act of 1864," and in the body of it referred to the Insolvent Act of 1864 : Held plea bad for the court was bound to look upon the plea as setting up a discharge under the Insolvent Act of 1864, and by Section 9, Sub-Section 4 of that Act, the plaintiff's rights were expressly preserved to him against all other persons liable for or with the insolvent (*Fowler* vs. *Perrin et al*, 16 C. P. U. C. 258). See this case cited under Section 59, supra.

On 2nd May, 1867, defendant R made an assignment under the Insolvent Acts, and on 27th, a deed of composition and discharge was executed by B and by R, who had been sued as B's surety, and other creditors as well as by the plaintiff, who, however, reserved his rights against any surety for his debt. On 10th February, 1868, plaintiff obtained judgment. On 13th February, R took an assignment of the judgment from the plaintiff, paying part only of the judgment debt. On an application by the defendant B to have his name struck out of the proceeding and judgment stayed as against him on the ground that the plaintiff was a party to the deed of composition and discharge : *Held* that B was entitled to this relief as well against the plaintiff as against R, and that he had accounted for his delay by a reasonable supposition that the plaintiff was proceeding on the judgment to recover the balance of the debt from the defendant. Semble that the assignee of the judgment cannot enforce it if the assignor could not (*Martin* vs. *Brummell et al*, 4 P. R. 229).

Discharge under this Act not to apply to certain debts or liabilities.

63. A discharge under this Act shall not apply, without the express consent of the creditor, to any debt for enforcing the payment of which the imprisonment of the debtor is permitted by this Act, nor to any debt due as damages for assault or wilful injury to the person, seduction, libel, slander or malicious arrest, nor for the maintenance of a parent, wife or child, or as a penalty for any offence of which the insolvent has been convicted; nor shall any such discharge apply without such consent to

any debt due as a balance of account due by the insolvent as Assignee, tutor, curator, trustee, executor or administrator under a will, or under any order of court, or as a public officer ; nor shall debts to which a discharge under this Act does not apply, nor any privileged debts, nor the creditors thereof, be computed in ascertaining whether a sufficient proportion of the creditors of the insolvent have voted upon, done, or consented to any act, matter or thing under this Act; but the creditor of any such debt may claim and accept a dividend thereon from the estate without being by reason thereof in any respect affected by any discharge obtained by the insolvent.

But creditor may accept a dividend.

This section is similar to the 100th Section of the Act of 1869, and differs from it in that by that section, it was provided that the discharge should not apply to the releasing of a debt for a penalty for any offence of which the insolvent has been convicted "unless the creditor shall file or claim therefor" in the above section, the words "unless the creditor shall file or claim therefor" are omitted.

Where an executor has become insolvent, so as not to have the means or refuses to act, the Court of Chancery will permit a creditor to bring a bill himself against persons accountable to the estate and have administration (*Burroughs* vs. *Elton*, 11 Ves. 29).

As to discharge under Insolvent Act, where party is liable to arrest, (see *Mackay* vs. *Goodson*, 27 U. C. R. 263).

The imprisonment of the debtor is permitted where he has been proved to have been guilty of fraud under Section 136. The debt in such case continues to exist notwithstanding the granting of the debtor's discharge.

Application to Court or Judge for discharge, if not obtained from creditors.

64. If, after the expiration of one year from the date of an assignment made under this Act, or from the date of the issue of a writ of attachment thereunder, as the case may be, the insolvent has not obtained from the required proportion of his creditors

a consent to his discharge, or the execution of a deed of composition and discharge, he may apply by petition to the court or judge, to grant him his discharge, first giving notice of such application, (Form L.) for one month in the Official Gazette, and also by letter or card postpaid, addressed, ten days before such application, by mail to each of his creditors whose claims amount to one hundred dollars or more, and may be affected by a discharge under this Act.

This section is similar to the 105th section of the Act of 1869, except it requires that notice be sent by letter or card to each creditor over $100 by mail, which was not required by that section.

The discharge to be granted under this section cannot have any greater effect to release the debtor from his liabilities than the discharge obtained by consent in writing of creditors, as provided in section 61 of this Act. Under the consent-discharge the insolvent is only freed from liabilities mentioned or set forth in the statement of his affairs exhibited at the first meeting of creditors, or which are shown by any supplementary list of creditors furnished by the insolvent previous to his discharge (see *King* vs. *Smith*, and *Palmer* vs. *Baker*, and *Farrell* vs. *O'Neil*, cited under section 61 supra).

For form of discharge see Form No. 6.

Proceedings on such application; and powers of the court or judge.

65. Upon such application, any creditor of the insolvent, or the Assignee by authority of the creditors or of the Inspectors, may appear and oppose the granting of such discharge upon any ground upon which the confirmation of a discharge may be opposed under this Act, or may claim the suspension or classification of the discharge or both; and whether such application be contested or not, it shall be incumbent upon the insolvent to prove that he has in all respects conformed himself to the provisions of this Act; and he shall submit himself to

any order which the court or judge may make, upon or without an application to that effect, to the end that he be examined touching his estate and effects and his conduct and management of his affairs and business generally, and touching each and every detail and particular thereof; and the court or judge may also require from the Assignee a report in writing upon the conduct of the insolvent and the state of his books and affairs before and at the date of his insolvency; and thereupon the court or judge, as the case may be, after hearing the insolvent and the opposant, if any, and any evidence that may be adduced, may make an order either granting the discharge of the insolvent or refusing it; or in like manner and under the like circumstances to those in and upon which the discharge could be suspended or classified as hereinbefore provided, upon an application to confirm it, an order may be made suspending it for a like period, or declaring it to be of the second class, or both.

Suspension or classification of second class.

The grounds on which the confirmation of an insolvent's discharge may be opposed are stated in section 56, and see notes to that section.

The report of the Assignee should state the amount of the assets and liabilities; the amount of dividend paid or what is likely to be payable to the creditors; the state in which insolvent's books were found; and also copies of any resolutions passed by the creditors. See section 52.

As to classification of discharge, see section 57.

Discharge &c., obtained by fraud to be void.

66. Every discharge or confirmation of any discharge obtained by fraud or fraudulent preference, or by means of the consent of any creditor procured by the payment or promise of payment to such creditor of any valuable consideration for such consent, or by any fraudulent contrivance or practice what-

ever tending to defeat the true intent and meaning of the provisions of this Act in that behalf, shall be null and void; and in no case shall a discharge have any effect unless and until it is confirmed by the Court.

This section is similar to the 108th section of the Act of 1869.

As to fraud and fraudulent preferences, see sections 130 to 137 inclusive, infra, and notes thereto.

SALE OF DEBTS.

Sale of debts, the collection of which would be too onerous.

67. After having acted with due diligence in the collection of the debts, if the Assignee finds there remain debts due, the attempt to collect which would be more onerous than beneficial to the estate, he shall report the same to the creditors or Inspectors, and, with their sanction, he may sell the same by public auction, after such advertisement thereof as they may order; and, pending such advertisement, the Assignee shall keep a list of the debts to be sold, open to inspection at his office, and shall also give free access to all documents and vouchers explanatory of such debts; but all debts amounting to more than one hundred dollars shall be sold separately, except as herein otherwise provided. Proviso.

Under the 44th section of the Act of 1869, it was necessary to obtain an order from the judge to sell debts. The above section only requires that the Assignee obtain the consent of the creditors or Inspectors.

Creditor may be authorized to take any special proceeding at his own risk.

68. If at any time any creditor of the insolvent desires to cause any proceeding to be taken which in his opinion would be for the benefit of the estate, and the Assignee, under the authority of the credi-

tors or of the Inspectors, refuses or neglects to take such proceeding after being duly required so to do, such creditor shall have the right to obtain an order of the judge authorizing him to take such proceeding in the name of the Assignee, but at his own expense and risk, upon such terms and conditions as to indemnity to the Assignee as the judge may prescribe; and thereupon any benefit derived from such proceeding shall belong exclusively to the creditor instituting the same for his benefit and that of any other creditor who may have joined him in causing the institution of such proceeding. But if, before such order is granted, the Assignee shall signify to the judge his readiness to institute such proceeding for the benefit of the creditors, the order shall be made prescribing the time within which he shall do so, and in that case the advantage derived from such proceeding shall appertain to the estate.

Proviso.

This section is a re-enactment of the 45th Section of the Act of 1869.

Rights of purchasers of debts due insolvent.

69. The person who purchases a debt from the Assignee may sue for it in his own name as effectually as the insolvent might have done, and as the Assignee is hereby authorized to do; and a bill of sale (Form M), signed and delivered to him by the Assignee, shall be *prima facie* evidence of such purchase, without proof of the handwriting of the Assignee, and the debt sold shall in the Province of Quebec vest in the purchaser without signification to the debtor; and no warranty, except as to the good faith of the Assignee, shall be created by such sale and conveyance, not even that the debt is due.

No warranty.

This section is a re-enactment of the 46th Section of the Act of 1869, except the words, "and the debt sold shall in the Province of Quebec vest in the purchaser without signification to the debtor."

LEASES.

Lease of property more valuable than rent to be sold; on what conditions.

70. If the insolvent holds, under a lease, property having a value above and beyond the amount of any rent payable under such lease, the Assignee shall make a report thereon to the judge, containing his estimate of the value to the estate of the leased property in excess of the rent; and thereupon the judge may order the rights of the Insolvent in such leased premises to be sold separately, or to be included in the sale of the whole or part of the estate of the insolvent, after such notice of such sale as he shall see fit to order; and at the time and place appointed such lease shall be sold upon such conditions, as to the giving of security to the lessor, as the judge may order; and such sale shall be so made subject to the payment of the rent, to all the covenants and conditions contained in the lease, and to all legal obligations resulting from the lease; and all such covenants, conditions and obligations shall be binding upon the lessor and upon the purchaser, as if he had been himself lessee and a party with the lessor to the lease.

This is similar somewhat to section 77 of the Act of 1869. It differs from that section in that the judge may order that the sale of the lease be either separate or be included in the sale of the whole or part of the estate of the insolvent, and that such sale be subject to all legal obligations resulting from the lease.

The lessee under a lease containing a covenant not to assign without leave in the statutory form made a voluntary assignment in Insolvency, on 17th May, 1869. The Assignee sold the stock in trade of the insol-

vent, who were dry goods merchants, and the purchaser took possession of the premises from him on the 27th of May, the Assignee also occupying a room there for the benefit of the estate ; *Held* that such assignment was a breach of the covenant and a forfeiture, for the term passed to the Assignee under the provisions of the Insolvent Act, and if any election to accept it were necessary on his part, it was shown by his conduct (*Magee* vs. *Rankin*, 29 Q. B. U. C. 257, and cases there cited).

Other cases of lease, how dealt with.

71. If the insolvent holds under a lease extending beyond the year current under its terms at the time of his insolvency, property which is not subject to the provisions of the last preceding section, or respecting which the judge does not make an order of sale, as therein provided, or which is not sold under such order, the creditors shall decide at any meeting, which may be held more than three months before the termination of the yearly term of the lease, current at the time of such meeting, whether the property so leased should be retained for the use of the estate, only up to the end of the then current yearly term, or, if the conditions of the lease permit of further extension, also up to the end of the next following yearly term thereof, and their decision shall be final.

This section is a re-enactment of the 78th sect. of the Act of 1869.

If the creditors elect to take the lease the Assignee will be bound by the election and will not be able afterwards to renounce, although it turns out a bad bargain (*Turner* vs. *Richardson*, 7 East, 342 ; *Broome* vs. *Robinson*, cited *ib.* 339) ; and the Assignee will be liable in respect of the rents and covenants as long as he holds the property (*Maynay* vs. *Edwards*, 13 C. B. 479 ; *White* vs. *Hunt*, L. R. 6 Ex. 30) ; but he may get rid of all liability by assigning the lease, and for this purpose he would be justified in assigning to a pauper if the lessor refused to accept a surrender (*Wilkins* vs. *Fry*, 1 Mer. 265 ; *Rowley* vs. *Adams*, 7 Beav. 417 ; *Onslow* vs. *Corrie*, 2 Mad. 330).

72. From and after the time fixed for the retention of the leased property for the use of the estate, the lease shall be cancelled, and shall from thenceforth be inoperative and null; and so soon as the resolution of the creditors as to such retention has been passed, such resolution shall be notified to the lessor, and if he contends that he will sustain any damage by the termination of the lease under such decision, he may make a claim for such damage, specifying the amount thereof under oath, in the same manner as in ordinary claims upon the estate; and such claim may be contested in the same manner, and after similar investigation, and with the same right of appeal, as herein provided for in case of claims or dividends objected to. Lessor claiming damages for termination of the lease.

This section is a re-enactment of the 79th sec. of the Act of 1869.

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73. In making such claim, and in any adjudication thereupon, the measure of damages shall be the difference between the value of the premises leased when the lease terminates under the resolution of the creditors, and the rent which the insolvent had agreed by the lease to pay during its continuance; and the chance of leasing or not leasing the premises again, for a like rent, shall not enter into the computation of such damages; and if the claim is not contested, or if, being contested, the damages are finally awarded to the lessor, he shall rank for the amount upon the estate as an ordinary creditor. How damages to be estimated.

This section is similar to the 80th sec. of the Act of 1869, the words "in adjudication thereupon" in this section being used instead of "any award thereupon" in that, and the words "and if the claim is not contested, or if being contested" in the above section are new.

Preferential claim of landlord limited in the several Provinces.

74. The preferential lien of the landlord for rent in the Provinces of Ontario, New Brunswick, Nova Scotia, British Columbia, Prince Edward Island, or Manitoba, is restricted to the arrears of rent due during the period of one year last previous to the execution of a deed of assignment or the issue of a writ of attachment under this Act, as the case may be, and from thence so long as the Assignee shall retain the premises leased. In the Province of Quebec the preferential lien or privilege of the lessor shall be governed by the provisions of the civil code.

This section is nearly similar to the 81st section of the Act of 1869, and includes British Columbia and Prince Edward Island and Manitoba, which were not included in that section, and further enacts that in the Province of Quebec the preferential lien or privilege of the lessor shall be governed by the civil code.

The 81st section of the Act of 1869 restricts the landlord to one year's rent, even where he has distrained for more before the insolvency of the tenant (*Griffith* vs. *Brown*, 21 U. C. C. P. 12 ; distinguished in *Mason* vs. *Hamilton*, in appeal, 22 U. C. C. P. 411, reversing the decision of C. P. in 22 C. P. 190).

Defendant, in consideration of the yearly rents, covenants and conditions in the lease contained, leased certain premises to one M at an annual rent, and as one of the covenants or conditions in consideration of which the demise was made, after reciting that M had agreed to pay $700 by way of additional rent for the purchase of the good will of the demised premises. M covenanted to pay the $700 in ten quarterly payments of $70 each, with a proviso that in case of the forfeiture of any of his covenants the said $700, or the balance thereof, was to become at once due and payable by way of rent, with a further covenant that if the term granted should be seized under execution or an attachment against him, or if he should make an assignment or become bankrupt or insolvent, or take the benefit of any Insolvent Act, the then current quarter's rent should immediately become due and payable, and the term become void. M failed to pay any portion of the $700, and after the accrual of the third quarterly payment became insolvent :

Held, that defendant had the right to distrain upon the goods on the demised premises for the three quarterly payments of $70 each that had accrued due before the insolvency, but that, notwithstanding the different provisions contained in the lease, he could not, having regard either to the common law, the Statute 8 Ann., chap. 14, sec. 6, or the 14th section of the Act of 1865, distrain for the whole $700 (*Griffith* vs. *Brown*, 21 U. C. C. P. 12).

With regard to rent the landlord may, in Quebec, claim for the amount payable to the end of the current yearly term after the assignment or the attachment, whether there be a lease or not, as by the common law of that Province the owner of premises rented yearly without a lease can claim judgment by privilege for the current year (Civ. Code, Art. 2005 ; Popham 86).

SALE OF REAL ESTATE.

Sale of real estate of Insolvent.

75. The Assignee may sell the real estate of the insolvent, but only after advertisement thereof for a period of two months, and in the same manner as is required for the actual advertisement of sales of real estate by the sheriff in the district or place where such real estate is situate, and to such further extent as the Assignee deems expedient; Provided that the period of advertisement may be shortened to not less than one month by the creditors with the approbation of the judge, but in the Province of Quebec such abridgment shall not take place without the consent of the hypothecary creditors upon such real estate, if any there be; and if the price offered for any real estate at any public sale duly advertised as aforesaid, is more than ten per cent. less than the value set upon it by a resolution of the creditors, or by the inspectors and the Assignee, the sale may be adjourned for a period not exceeding one month, when, after such notice as the inspectors and the Assignee may deem proper to give, the sale

In Quebec

shall be continued, commencing at the last bid offered on the previous day when the property was put up at auction, and if no higher bid be then offered, the property shall be adjudged to the person who made such last bid: Provided that with the consent of the hypothecary or privileged creditors, or where there are no hypothecary or privileged creditors with the approbation of the creditors or of the inspectors, the Assignee may postpone the sale to such time as may be deemed most advantageous for the estate, and whenever the sale shall have been so postponed beyond one month, the last bidder shall be discharged from any obligation under the bid he may have made on the previous day when the property was offered for sale by auction.

Proviso; postponement of sale by consent of creditors, &c.

The provisions in this section for adjournment are new (See 47th section of the Act of 1869). By that section if the Assignee thought the amount offered was too small, he might withdraw the land, and sell it subsequently under such directions as he received from the creditors.

The time and manner of advertising the sales of real estate by the sheriff is prescribed by the Common Law P. Act, Con. Stat. U. C., ch. 22, sec. 267. 31 Ont., chap. 6, requires that the notice be published in the *Ontario Gazette*. In Quebec it must be advertised in the Official Gazette and in one English and in one French newspaper, and in addition, announced at the church door of the parish where the land lies. Civ. Pro. L. C., art. 648. The Assignee may, however, advertise to such further extent as may appear expedient to him (Popham, 75).

The mortgagee of an insolvent is not obliged to wait for the disposal of the estate by the Assignee, but may exercise his power of sale under the mortgage and rank on the estate for any deficiency (*In re Hurst*, 31 U. C. Q. B. 116).

Effects of sales of real estate

76. All sales of real estate so made by the Assignee shall vest in the purchasers all the legal

and equitable estate of the insolvent therein, and the conveyance may be in the Form N; but in the Province of Quebec, such sale shall in all respects have the same effect as to mortgages, hypothecs or privileges then existing thereon, as if the same had been made by a sheriff under a writ of execution issued in the ordinary course, but shall have no other, greater or less, effect than such sheriff's sale: and in the Province of Quebec the title conveyed by such sale shall have equal validity with a title created by a sheriff's sale; and the deed of such sale which the Assignee executes (Form N,) shall, in the Province of Quebec, have the same effect as a sheriff's deed; but the Assignee may grant such terms of credit as he may deem expedient and as may be approved of by the creditors, or by the inspectors, for any part of the purchase money; except that no credit shall be given in the Province of Quebec for any part of the purchase money coming to any hypothecary or privileged creditor without the consent of such creditor; and the Assignee shall be entitled to reserve a special hypothec or mortgage by the deed of sale as security for the payment of such part of the purchase money as shall be unpaid; and such deed may be executed before witnesses or before notaries, according to the exigency of the law of the place where the real estate sold is situate. Form of deed and terms.

This section is somewhat similar to the 48th section of the Act of 1869. The words, "or by the inspectors" are not in that section.

The purchaser under the above section will take the same title that the insolvent had at the date of the assignment, or at the time the writ of attachment was placed in the Assignee's hands.

As to the sale of the equity of redemption of a mortgagor see the 258th section of the C. L. P. Act.

In Quebec a sale by the sheriff purges the property of all claims and mortgages, except dower created anterior to the mortgages (Civ. Code L. C., art. 1447), or entail (*ibid.* art. 950), or Seignorial Rights (*ibid.* art. 2881). With these exceptions of dower, entail, crown dues and seignorial rights, the purchaser of real estate in that Province would, under this Act, obtain the property clear of all encumbrances, registered or not. The mortgage creditors having only the right to be paid by privilege from the proceeds of the sale, according to the registration of their claims (Popham, 77).

Sales in Quebec may be subject to certain charges.

77. In the Province of Quebec such sale may be made subject to all such charges and hypothecs as are permitted by the law of the said Province to remain chargeable thereon when sold by the sheriff, and also subject to such other charges and hypothecs thereon, as are not due at the time of sale—the time of payment whereof shall not, however, be extended by the conditions of such sale; and also subject to such other charges and hypothecs as may be consented to in writing by the holders or creditors thereof. And an order of re-sale for false bidding may be obtained from the judge by the Assignee upon summary petition; and such re-sale may be proceeded with after the same notices and advertisements, and with the same effect and consequences as to the false bidder, and all others, and by means of similar proceedings as are provided in ordinary cases for such re-sales, in all essential particulars and as nearly as may be without being inconsistent with this Act. And as soon as immoveables are sold by the Assignee, he shall procure from the registrar of the registration division in which each immoveable is situate, a certificate of

Folle enchere.

Certificate of registrar.

the hypothecs charged upon such immoveable, and registered up to the day of the issue of the writ of attachment, or of the execution of the deed of assignment by which the estate of the insolvent was brought within the purview of this Act, as the case may be: And such certificate shall contain all the facts and circumstances required in the registrar's certificate obtained by the sheriff subsequent to the adjudication of an immoveable in conformity with the provisions of the Code of Civil Procedure, and shall be made and charged for by the registrar in like manner: And the provisions of the said Code as to the collocation of hypothecary and privileged creditors, the necessity for and the filing of oppositions for payment, and the costs thereon, shall apply thereto under this Act as nearly as the nature of the case will admit: And the collocation and distribution of the moneys arising from such sale shall be made in the dividend sheet among the creditors having privileged or hypothecary claims thereon, after the collocation of such costs and expenses, including the Assignee's commission on the amount of the sale, as were necessary to effect such sale or are incident thereto, in the same manner as to all the essential points thereof as the collocation and distribution of moneys arising from the sale of immoveables are made in the appropriate court in ordinary cases, except in so far as the same may be inconsistent with any provisions of this Act; but no portion of the general expenses incurred in the winding up of the estate, shall be chargeabe to, or payable out of the said moneys, except on such balance as may remain after the payment of all privileged and hypothecary claims. The As-

Code of Civil Procedure to apply.

Order of distribution.

Assignee's commission.

Balance.

signee's commission on such sale shall be the same as the poundage to which the sheriff is entitled on sales made by him: Any balance remaining after the collocation of the said necessary costs and expenses, and of the privileged and hypothecary claims, shall be added to and form part of the general assets of the estate.

The mode of advertising and re-selling real estate sold by a sheriff, and the legal effect thereof, in Quebec, will be found explained in the Code of Civil Procedure, arts 690 *et seq.*

The section provides that the rules of the Code of Civil Procedure shall be applied in these respects "as nearly as the nature of the case will admit."

By this section the Assignee is required to obtain the certificate of the registrar of the mortgages and claims entered against the real estate sold, or to be sold. By the Code, the creditors of claims thus registered, need not file their claims or oppositions to secure payment from the proceeds of the sale. (Art. 719.) Consequently, no such claims need be made by a mortgagee or registered creditor to the proceeds of real estate sold under this Act. But if such proceeds be wholly or partially insufficient to pay a claim, he can rank on the estate generally with the unsecured creditors for the whole or any unpaid balance.

Under the Code, oppositions for payment, on claims not registered, must be made within six days after the return. That is after the return of the sheriff to the court stating the amount in his hands from the sale available for distribution. (Art. 720.) Under this Act, it may be presumed they should be filed within six days from the deposit of the purchase-money with the Assignee.

The opposition should state distinctly the nature of the claim, with the dates and place, and the documents or titles in support of its pretensions.

By the Code, the prothonotary must prepare a scheme of distribution between the sixth and twelfth day after the sheriff's return. (Art. 724.) Under this Act, it may be assumed it should be made by the Assignee within twelve days from the payment by the purchaser.

In this sheet the name of each claimant must be inserted in the nu-

merical order, and the nature and amount of each claim, and whether it effects the whole or a part of the property (*Ibid.* Art. 726).

The moneys must be divided and paid in the following order :—

I. The law costs in selling the property, &c. (*Ibid.* Art. 788.)

II. The mortgages according to the date of registration.

III. Non-registered claims *pro rata* according to the provisions of this Act.

As regards the ranking of certain special privileges, which, in ordinary cases, may not arise, such as that of the builder, of seigniorial dues, &c., reference is directed to the Civil Code (Art. 2009 *et seq.*) and the code of procedure (Art. 727 *et seq.*). The Assignee, who is not experienced in these matters, may find it necessary to consult his legal adviser before completing a collocation (Popham, 79).

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78. In the Province of Quebec any privileged or hypothecary creditor whose claim is actually due and payable, shall have the right to obtain from the judge an order on the Assignee to proceed without delay to the sale in the mode above prescribed, of any property real or personal which is subject to his privileged or hypothecary claim; and such creditor may also one month after the sale has taken place, or one month after the Assignee has received the price thereof, if not paid at the time of the sale, obtain an order from the judge to compel the Assignee to make a dividend of the proceeds of such sale.

In Quebec privileged creditors may require sale of property subject to their privileged claims.

This section is new.

In Ontario the mortgagee can take the initiative, so as to realize his security (*In re Hurst*, 31 U. C. Q. B. 116).

DIVIDENDS.

79. Upon the expiration of the period of one month from the first meeting of the creditors, or as

Accounts, state-

ments and dividends by Assignee.

soon as may be after the expiration of such period, and afterwards from time to time at intervals of not more than three months, the Assignee shall prepare and keep constantly accessible to the creditors, accounts and statements of his doings as such Assignee, and of the position of the estate; and he shall prepare dividends of the estate of the insolvent whenever the amount of money in his hands will justify a division thereof, and also whenever he is required by the inspectors or ordered by the judge to do so.

What claims shall rank on the estate.

80. All debts due and payable by the insolvent at the time of the execution of a deed of assignment, or at the time of the issue of a writ of attachment under this Act, and all debts due but not then actually payable, subject to rebate of interest, shall have the right to rank upon the estate of the insolvent; and any person then being, as surety or otherwise, liable for any debt of the insolvent, and who subsequently pays such debt, shall thereafter stand in the place of the original creditor, if such creditor has proved his claim on such debt; or if he has not proved, such person shall be entitled to prove against and rank upon the estate for such debt to the same extent and with the same effect as the creditor might have done.

This section is a re-enactment of the 56th section of the Act of 1869.

One partner may prove for the firm (*Ex parte Hodgkinson*, 19 Ves. 293 ; *ex parte Mitchell*. 14 Ves. 593).

The guardian of an infant may prove on his behalf (*Ex parte Beltan*, 1 Atk. 251 ; *Walcott* vs. *Hall*, 2 Bro. C. C. 305).

The Assignee of a bankrupt may prove for a debt due to the bankrupt ;

but it would seem that the bankrupt should join in the affidavit of debt (*Ex parte Robson*, 2 M. D. & D. 65).

Where a debt is due to a deceased creditor, his executor is the proper person to prove (*Ex parte English*, 2 Bro. C. C. 609; *ex parte Coleman*, 2 D. & C. 584).

All the trustees ought, as a general rule, to join in a proof of a debt due to the trust (*Ex parte Smith*, 1 Dea. 375; 2 M. & A. 536. See *Ex parte Phillips*, 2 Dea. 334). But proof may be made by some or one of the trustees if the concurrence of all cannot be obtained, as where the others or other is or are abroad (*Ex parte Smith, ex parte Phillips*, supra).

A *feme covert* was allowed to prove against her husband's estate in respect of a fund to which she was entitled for her separate use, and of which he was the trustee, and a trustee was appointed to receive the dividends (*Ex parte Wells*, 2 M. D. & D. 504; *ex parte Thring*, M. & Ch. 75; *ex parte Melbourn*, L. R. 6 Ch. Ap. 64, 835).

A receiver appointed in a chancery suit to get in the testator's estate would seem to be the proper person to prove for a debt due to the estate (*Armstrong* vs. *Armstrong*, L. R, 12 Eq. 614; Robson, 2nd Edition, pp. 182-3-4).

The only reasonable mode of arriving at the rebate of interest is to adopt the date of the deed of assignment, or of the appointment of the Official Assignee, as the period from which it is to be calculated (Abbott, p. 40).

The holder of a bill of exchange or promissory note may prove for the amount against all the parties liable upon it (*Starey* vs. *Barns*, 7 East 435; *Alsager* vs. *Currie*, 12 M. & W. 751). The holder may receive a dividend from each of the estates against which he proves until he receives 20s. in the pound; and if after proof he receives dividends from other parties to the bill or note, that will not be deducted from the amount of his proof, and he will be entitled to receive a dividend on the full amount until the debt is satisfied (*Ex parte Wildman*, 1 Atk. 109, 2 Ves. 113; *ex parte Bank of Scotland*, 2 Rose, 197, 19 Ves. 310; Robson, 2nd Edition, 200). If at time of proof the creditor has received part of debt, he will be allowed to prove for the residue only, after deducting amount paid or declared (*Ex parte Todd*, 2 Rose, 202 note; Robson, 2nd Ed., 200).

It is not necessary for purposes of proof that the bill or note should have actually become due or payable at the time of insolvency, subject, however, to rebate of interest (*Alsagar* vs. *Currie*, 12 M. & W. 755).

The holder of a note payable on demand may prove, though no demand has been made before the insolvency (*Ex parte Beaufoy*, Co. B. Law, 8th Ed., 180).

If a bill is dishonoured it is the duty of the holder to give notice. By neglecting to use due diligence in giving notice he may lose his remedy upon it against some of the parties, and cannot, therefore, prove against their estates if they become bankrupt (*Rhode* vs. *Proctor*, 4 B. & C. 517 ; *ex parte Bignold*, 2 M. & S. 633).

The same rules as to the time and mode of giving notice of dishonour, and as to what constitutes due diligence, and under what circumstances absence of notice is excused, would seem to apply in the case of bankruptcy as where no bankruptcy has occurred (*Ex parte Chappel*, 3 M. & A. 493 ; *Gladwell* vs. *Turner*, L. R. 5 Ex. 59 ; Byles on bills, 9th Ed., p. 263 et seq. ; Robson, 2 Ed., pp. 201 & 202).

As to forfeiting right to proof by giving time to acceptor of bill or maker of note (see *Moss* vs. *Hall*, 5 Ex. 46 ; *Davies* vs. *Stambank*, 6 D. M. & G. 679 ; *Pooley* vs. *Harradine*, 7 E. & B. 431 ; *Oriental Fin. Comp.* vs. *Overend*, L. R. 7 Ch. Ap. 142).

If the holder has compounded with acceptor or maker without consent of bankrupt, drawer or endorser, and without reserving his rights against sureties, he will not be entitled to prove it against the bankrupt's estate (*Ex parte Wilson*, 11 Ves. 419 ; *Bickerdike* vs. *Bollman*, 1 T. R. 405 ; *ex parte Smith*, 3 Bro. C. C. 1).

Rule where bill or note given for greater amount than debt due (Robson, 2 Ed., 204 ; *Ex parte Bloxham*, 6 Ves. 449 ; *ex parte Reader*, Buck. 381).

Where debtor transfers to his creditor as collateral security for his debt bills of third parties, the creditor will be entitled to prove for full amount of the collaterals so transferred, and this notwithstanding he may have received part payment of his debt, for otherwise he would not get the full benefit of his security (*Ex parte Reed*, 3 D. & C. 481 ; *ex parte Phillips*, 1 M. D. & D. 232).

As to proof where bill given as a pledge, even when indorsed by the debtor (see *Ex parte Twogood*, 19 Ves. 229). As to what constitutes a valid endorsement (see *Denton* vs. *Peters*, L. R. 5 Q. B. 475). Where bill is deposited by drawer and not indorsed by him (see *Ex parte Phillips*, supra).

A bill or note cannot, as such, be proved against a person not a party to it (*Ex parte Roberts*, 2 Cox, 171) though he give a written engagement not on the bill or note, to guarantee the payment of it (*Ex parte Harri-*

son, 2 Cox, 172 ; *ex parte Bird*, 4 D. & S. 273 ; *ex parte Hustler*, 1 G. & J. 9).

If a bill or note was given to any party by the bankrupt before his bankruptcy, *bona fide*, and for valuable consideration, and the bankrupt omitted contrary to agreement to endorse it, he or his trustee may be required to do so after his bankruptcy (*Ex parte Greening*, 13 Ves. 206 ; *ex parte Mowbray*, 1 J. & W. 428 ; *ex parte Rhodes*, 2 Dea. 364 ; *ex parte Hall*, 1 Rose, 13 ; *ex parte Stewart*, 1 G. & J. 344).

A holder of notes bought for less than the full amount may prove for the full amount against the parties liable on them (*Ex parte Lee*, 1 P W. 782 ; *ex parte Atkins*, Buck. 479 ; *ex parte Rogers*, Buck. 490).

A *bona fide* holder for valuable consideration may prove against any of the parties liable upon an accommodation bill until he has received 20s. in the pound on the consideration actually paid by him (*Ex parte Crossley*, 3 Bro. C. C. 237 ; *ex parte Vere & Co.*, 2 M. & A. 123 ; *ex parte Fairlie*, 3 D. & H. 285 ; *ex parte Bloxham*, 6 Ves. 449 ; *ex parte Solarte*, 3 D. & Ch. 419 ; *Fentum* vs. *Pocock*, 5 Taunt. 192).

As to proof of bill or note *supra protest* (see *Ex parte Swan*, L. R. 6 Eq. 344 ; *ex parte Lambert*, 13 Ves. 179).

If in case of mutual accommodation paper the account between the parties consists partly of dishonoured or outstanding bills and partly of a cash account, proof can only be made in respect of the latter, and the bills must be struck out on both sides (*Ex parte Walker*, 4 Ves. 373 ; *ex parte Earle*, 5 Ves. 833 ; see *ex parte Metcalf*, 11 Ves. 404).

If acceptance of a bill is obtained by fraud and without negligence on the part of the acceptor, a *bona fide* holder for value, without notice, cannot prove it against the acceptor ; neither can there be any proof on a forged acceptance (*Foster* vs. *MacKinnon*, L. R. 4 C. P. 704 ; see *ex parte Samuel*, 2 M. D. & D. 384 ; *Prince* v. *Dawson*, 2 De G. & J. 41 ; *Phillips* vs. *Im. Thurn*, L. R. 1 C. P. 463 ; *Morris* v. *Bethell*, L. R. 5 C. P. 47).

The same rules apply to lands as in the case of bills of exchange, as to creditors' rights and as to amount for which he is entitled to prove (Robson, 2 Ed., 211 and 212).

A mere agreement to accept a composition in discharge of a debt will not operate as a release of the debt if the composition is not duly paid (*Ex parte Bateson*, 1 M. D. & D. 289 ; *ex parte Crosbie*, 2 M. & A. 393 ; *ex parte Powell*, 2 M. & A. 533) ; and on failure of the debtor to pay the composition the original debt will revive, and be proveable under the

subsequent bankruptcy of the debtor (*Ex parte Bateson; Ex parte Crosbie; Ex parte Powell*, ubi supra).

In an agreement between a debtor and one of his creditors, the latter agreed to accept, by way of compensation, certain notes of the debtor, payable at specified dates; and it was provided that the debtor should give his note for the whole debt, and that if he were guilty of any default in paying the composition notes the creditor should rank on the estate for the whole debt. The notes were given accordingly, the debtor made default and afterwards was proceeded against under the Insolvent Act: *Held*, that the stipulation as to the whole debt was not illegal, and that there having been default before the insolvency the creditor was entitled to prove for the whole debt (*Ex parte McRae*, 15 Grant, 408).

If the intention was to substitute the composition absolutely for the original debt, the latter will not be revived by non-payment of the composition (*Ex parte Hernaman*, 12 Jur. 643).

If the composition deed contains an absolute release of the original debt all right to sue or prove in respect of it will be barred, and proof, in the event of the debtor's bankruptcy, can only be made for the composition (*Small* vs. *Marwood*, 9 B. & C. 300); but this will not be the effect of the release if it is given conditionally on due payment of the composition (*Hyde* vs. *Watts*, 12 M. & W. 254), and a release in a statutory composition deed was held not to release a co-debtor who was liable as a principal (*Andrew* vs. *Macklin*, 6 B. & S. 201).

If payment of the composition is accepted unconditionally, the creditor will be barred although the composition deed turns out to be invalid (*Kitchens* vs. *Hawkins*, L. R. 2 C. P. 22).

It is essential for the validity of a composition between a debtor and his creditors that all should be placed on an equal footing, therefore, if there is a secret bargain with one for an additional advantage to him as the condition of his accepting the composition, such bargain will be absolutely void, and will entitle the other creditors to set aside the composition and resort to their original debts (*Daughish* vs. *Tennant*, L. R. 2 Q. B. 49; *Wood* vs. *Barker*, L. R. 1 Eq. 139).

As to proof of contingent debts and liabilities see notes to sec. 81.

Case of contingent claims provided for.

81. If any creditor of the insolvent claims upon a contract dependent upon a condition or contingency which does not happen previous to the decla

ration of the first dividend, a dividend shall be reserved upon the amount of such conditional or contingent claim until the condition or contingency is determined; but if it be made to appear to the judge that the estate may thereby be kept open for an undue length of time, he may, unless an estimate of the value of such claim be agreed to between the claimant and the inspectors, order that the value of such contingent or conditional claim be established by such person or persons as the claimant and the inspectors may appoint, and in case they do not agree, then by such person or persons as the judge shall name, and the persons so named shall make their award, which award the judge, after hearing the claimant and inspectors, may reject or confirm. In case the award be rejected, other persons shall be appointed as herein provided to establish the value of such claim, subject to the control of the judge, and if the said award be confirmed, the amount therein mentioned shall be that for which the claimant shall rank upon the estate as for a debt payable absolutely.

Arbitration. If the award be rejected.

By the 57th Section of the Act of 1869, the judge may, in case the estimate is not agreed to between the claimant and the Assignee, order the Assignee to make an award upon the value of such contingent or conditional claim, which award should be subject to appeal. The award may be regulated according to life-insurance tables or other reliable data. There must not only be a debt or engagement to pay a definite sum, but also that contingency on which the debt was payable should be one reduceable to a matter of calculation, so as to allow a value to be put on the debt for the purpose of proof (*Ex parte Tindal*, 1 D. & C. 291, Mont. 375, 462; *ex parte Marshall*, 1 M. & A. 118).

In respect of marriage settlements, those cases only were held to be within the statute where the contingency depended on the lives of persons in existence (*Ex parte Tindal*, I. D. & C. 291).

When the contingency depended on the lives of persons unborn, or any other uncertain event as to which no calculation could be made, or where the contract was to pay an uncertain sum, the amount of which could only be ascertained by the jury: *Held* not within the statute (*Ex parte Tindal*, supra; *Parker* vs. *Ince*, 4 H. & N. 53). A demand on a guarantee for the payment of bills given for the price of goods supplied to a third party, and which had not become payable at the time of the bankruptcy of the guarantor: *Held* to be a debt proveable (*Ex parte Meyers*, M. & Bl. 229, 2 D. & C. 251; *in re Willis*, 4 Ex. 530). A guarantee in writing may be withdrawn at any time without the consent of the person guaranteed, provided the guarantee has not been acted upon.

The statute did not apply to contracts for payment of premiums on policies not due at the date of the bankruptcy (*Atwood* vs. *Partridge*, 4 Bing. 209). Or to the liability of sureties for the payment of annuities where there was a solvent grantor (*Thompson* vs. *Thompson*, 2 Bing. N. C. 168). Or to the implied liability to contribution as between co-sureties (*Wallis* vs. *Swinburne*, 1 Ex. 203). Or to contracts in the nature of indemnity (*Sallop* vs. *Ebers*, 1 B. & Ad. 700). Or to a contract or penalty for doing or not doing some particular act not being the payment of money (*Taylor* vs. *Young*, 3 B. & Ald. 521). Nor is a railway call made after the bankruptcy of a shareholder (*General Discounting Company* vs. *Stokes*, 34 L. J. C. P. 25). And see *In re McRae*, 15 Grant, 408, cited under Section 80, supra. Debts incurred subsequent to the assignment cannot rank on the estate.

A manufacturer of iron contracted, in May, 1871, to sell to a company 150 tons of iron at a specified price per ton, delivery to be 20 tons per month; the deliveries were not duly made under the contract. In January, 1872, the vendor filed a petition for liquidation by arrangement. At that time a considerable quantity of iron remained to be delivered, and the market price of iron had risen very much. It appeared that in some cases the company had bought iron in the market to supply the deficiency in the monthly deliveries. It did not appear that any actual request had been made by the vendor for the postponement of the deliveries: *Held* thrt the company could prove in the liquidation only for the difference between the contract price of the iron and the market prices of the days when the respective different deliveries were made (*Ex parte Llansamlet Tin Plate Company; in re Voss*, L. R. 16 Eq. 155; and see *Kent* vs. *Thomas*, L. R. 6 Ex. 312).

82. In the preparation of the dividend sheet due regard shall be had to the rank and privilege of every creditor—which rank and privilege, upon whatever they may legally be founded, shall not be disturbed by the provisions of this Act, except in the Province of Quebec, where the privilege of the unpaid vendor shall cease from the delivery of the goods sold; but no dividend shall be allotted or paid to any creditor holding security from the estate of the insolvent for his claim, until the amount for which he shall rank as a creditor upon the estate as to dividends therefrom shall be established as hereinafter provided; and such amount shall be the amount which he shall be held to represent in voting at meetings of creditors, and in computing the proportion of creditors, whenever under this Act such proportion is required to be ascertained.

Rank and privilege of creditors; Proviso as to creditors holding security.

The 58th Section of the Act of 1869 does not contain the words "Except in the Province of Quebec, where the privilege of the unpaid vendor shall cease from the delivery of the goods sold."

As to question of when delivery to purchaser has taken place, so as to deprive the vendor of the right to stop the goods in transitu, see notes to Section 16.

As to creditors holding securities, see notes to Sections 84 and 87.

Held, in Montreal, that the privilege of the landlord on the proceeds of the effects found on the premises leased has precedence over the privilege of the Assignee and the insolvent for the costs of their respective discharges under the Act of 1864, and that the dividend sheet must be reformed accordingly (*Morgan Insur. Co.* vs. *Whyte & Biron*, contest 13 L. C. Jur. 187).

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83. No lien or privilege upon either the personal or real estate of the insolvent shall be created for the amount of any judgment debt, or of the interest

Seizure in execution after appointment of Assig-

nee; its effect.

thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the insolvent, if before the payment over to the plaintiff of the moneys actually levied under such writ, the estate of the debtor has been assigned to an Assignee, or if proceedings to place the same in liquidation under this Act, have been adopted and are still pending. But this provision shall not affect any lien or privilege for costs which the plaintiff possesses under the law of the Province in which such writ shall have been issued.

Proviso as to costs.

The 59th Section of the Act of 1869 required that an assignment should have been made, or that the estate should have been placed in compulsory liquidation. The difference between that section and this is considerable. Where an attachment under the Absconding Debtors' Act was received by the sheriff and acted upon, and afterwards writs of *Fi Fa* were placed in his hands, and he subsequently received an attachment under the Insolvent Act of 1864: *Held* that defendant's property passed to the Assignee, but he must give the execution creditors the priority to which they would be entitled (*Henry* vs. *Douglas*, 1 U. C. L. J. [N. S.] 108).

Judicial proceedings and statutes take effect in law from the earliest period of the day upon which they are respectively originated and come into force. M recovered a judgment, and issued a *Fi. Fa.* and placed it in sheriff's hands against the goods of R. The writ was placed in sheriff's hands at 10.30, and levy made about 11 A.M. On same day, but after levy, C sued out against R. a writ of attachment in insolvency, which sheriff received at 11.30 A.M. On same day the Insolvent Act of 1865 came into force, the royal assent having been given in the afternoon, by which, in effect, this execution, unless theretofore issued and delivered to the sheriff, was postponed to the attachment: *Held* that the attachment prevailed over the execution: *Held*, also, that the execution creditor was not entitled to any lien for costs. *Semble* that the issuing of the attachment was a judicial act, and by it the property of the insolvent vested in the Assignee by relation before it was seized thereunder and before any lien

attached under the execution for costs (*Converse et al* vs. *Michie*, 16 U. C. C. P. 167).

Section 59 of the Act of 1869 applies to judgment debts recovered in the Division Court on which execution has been issued to and the money levied thereunder by a bailiff of such courts, although the section speaks only of executions delivered to the sheriff (*Patterson* vs. *McCarthy*, 35 Q. B. U. C. 14).

Held that under Section 13 of the Act of 1869 a judgment creditor who had an execution in the sheriff's hands at the making of an assignment, was entitled to rank for his costs of the judgment as a privileged creditor against the insolvent (*In re Hayden*, 29 Q. B. U. C. 262).

Where an assignment is made under the Insolvent Act of 1869, it is the duty of the sheriff who has seized goods under a *Fi. Fa.* against the insolvent to surrender the goods to the Assignee, leaving the execution plaintiff to assert his privilege for costs, if any he has in proceedings in insolvency (*Blakely* vs. *Hall*, 21 C. P. U. C. 138).

A stay of proceedings was given to a sheriff on an execution in his hands by the attorney for the execution creditor: *Held* that the execution under which they claimed priority over an Official Assignee had not been placed in sheriff's hands until too late to give them priority as regards the balance due thereon; the assignment having been made within 30 days after the time given the sheriff for execution; but that the execution creditors were entitled to a privileged lien for costs (*In re Fair* vs. *Buist*, 2 U. C. L. J. [N. S.] 216).

Section 13 of the Act of 1865, divesting of any lien or privilege extends only to the levying upon or seizing under the execution, not to the sale thereunder. In this case an execution had been placed in the sheriff's hands on the 15th March, 1866, and on the 26th a sale thereunder commenced at 10 A.M., was completed at 11 A.M., at which hour a writ of attachment was placed in the sheriff's hands against the defendant: *Held* that an attachment could not prevail over the execution (*Converse* vs. *Michie*. 16 C. P. U. C. 167, distinguished; *Whyte* vs. *Treadwell*, 17 C. P. U. C, 488). It would seem that the purchase at a sheriff's sale is perfectly safe, as it is the proceeds, and not the goods, that will go to the sheriff.

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84. If a creditor holds security from the insolvent, or from his estate, or if there be more than one insolvent liable as partners, and the creditor hold security from, or the liability of one of them as

As to creditors holding security for their claims.

security for a debt of the firm, he shall specify the nature and amount of such security or liability in his claim, and shall therein on his oath put a specified value thereon ; and the Assignee, under the authority of the creditors, may either consent to the right to rank for such liability, or to the retention of the property or effects constituting such security or on which it attaches by the creditor, at such specified value, or he may require from such creditor an assignment of such liability, or an assignment and delivery of such security, property or effects, at an advance of ten per centum upon such specified value, to be paid by him out of the estate so soon as he has realized such security, in which he shall be bound to the exercise of ordinary diligence ; and in either of such cases the difference between the value at which the liability or security is retained or assumed and the amount of the claim of such creditor, shall be the amount for which he shall rank and vote as aforesaid ; and if a creditor holds a claim based upon negotiable instruments upon which the insolvent is only indirectly or secondarily liable, and which is not mature or exigible, such creditor shall be considered to hold security within the meaning of this section, and shall put a value on the liability of the party primarily liable thereon as being his security for the payment thereof; but after the maturity of such liability and its non-payment he shall be entitled to amend and re-value his claim.

Security not matured and insolvent only secondarily liable.

This is similar to the 60th section of the Act of 1869.

The words "a creditor holding security from the insolvent or from his estate" were evidently intended to designate a creditor holding a mortgage, charge or lien on the bankrupt's estate for a debt due to him, and therefore they do not include a creditor who has merely levied execution

by seizing the debtor's goods under a *Fi. Fa.*, and who does not acquire a security in the nature of a mortgage, charge or lien within the meaning of the Act. See notes to Sect. 83 (*Holmes* vs. *Tutton*, 5 Ell. & Bl. 65).

A mortgage of an equity of redemption where the legal estate is in the first mortgagee, is regarded in bankruptcy as a legal mortgage, the security being denominated a legal mortgage of an equitable estate. Any security, in fact, which assumes the form of an ordinary mortgage, is regarded in bankruptcy as a legal mortgage (*Ex parte Robinson*, 2 D. & C. 119 ; *ex parte Aple*, 1 M. & A. 621 ; *ex parte Atwood*, 2 M. & A. 24).

Equitable mortgages may be created by an agreement in writing without an actual deposit of deeds or by a parol agreement accompanied by a deposit of deeds.

It is now settled that the delivery of deeds for the purpose of preparing a mortgage will create a good equitable mortgage (*Ex parte Wright*, 19 Ves. 258 ; *Edge* vs. *Worthington*, 1 Cox, 211 ; *Keys* vs. *Williams*, 3 Y. & C. 55).

The defendant, an Official Assignee, having taken possession of certain goods and premises and being sued by a mortgagee claimed a deduction from the plaintiff's damages, for rent, insurance and taxes paid by him out of the proceeds of sales : *Semble*, that it should have been allowed only if due when he took possession, but this did not appear, and under the circumstances the Court refused to interfere (*Matthews* vs. *Lynch*, 28 Q. B. U. C. 354).

An Official Assignee sued for trespass in taking and selling goods pleaded (relying upon the 50th sect. of the Act of 1869) that before the writ of attachment hereinafter mentioned, one C mortgaged the goods to the plaintiff, that while said goods were in C's possession, the mortgage providing that he should retain them until default, the sheriff seized the goods under an attachment in insolvency issued at the suit of M, and placed them in the custody of defendant, being an Official Assignee and guardian, and defendant being afterwards duly made Assignee of C's estate, sold the goods which are the alleged trespasses : *Held*, a bad plea for only negativing a default by C, when the attachment issued, not when the defendant received and sold the goods : *Semble*, that the action referred to only restrains a suit by creditors who have proved or can prove on the estate, and does not prevent a mortgagee from suing in trespass for a wrongful taking of goods (*Archibald* vs. *Haldane*, 30 Q. B. U. C. 30).

On the sale of a woollen factory and machinery it was stipulated that until the purchase money should be fully paid the vendees were not to remove the machinery. The vendors afterwards executed a conveyance to

the purchasers, and the latter to secure the unpaid purchase money executed a mortgage which purported to be of the factory only, and did not mention the machinery. The purchasers resold, the vendee having notice of the covenant, and the vendee subsequently became insolvent: *Held* that the covenant against removing the machinery remained in force, and that the vendee's Assignee in insolvency was not at liberty to remove the machinery by reason of non-registration under the Chattel Mortgage Act or otherwise (*Crawford* vs. *Findlay*, 18 Grant 51). *Held* that in equity and insolvency proceedings the description in a chattel mortgage, all goods now in possession of the mortgagee in the shop occupied by him and also any stock thereafter purchased by him, and which might be in his possession upon said premises during the continuance of the said mortgage or any renewal thereof was sufficient to hold such after acquired goods under such mortgage or renewal thereof (*Re Thirkell. Perrin* vs. *Wood*, 21 Grant. 492).

Where goods were mortgaged, and after default remained with the mortagor who made an assignment in insolvency, and handed them over to his Assignee: *Held* that the mortgagee could not take them out of the Assignee's possession, but must enforce his claim under the Insolvent Act, and that he was a trespasser in so taking them (*Dumble* vs. *White*, 32 Q. B. U. C. 601).

Declaration for entering a mill and taking and converting plaintiff's goods. Plea in substance that the plaintiff's claim to the goods and mill is only under a mortgage made by one W. who before the grievances complained of, made an assignment under the Insolvent Act of 1869 to defendants of all his estate and effects, including this mill and goods subject to plaintiff's mortgage. That W. was then in possession of the premises, and such possession was transferred to defendant, who took possession as such Assignee, and except as Assignee defendant has in no way interfered with the mill or goods. That the plaintiffs alleged right of property can be determined by the county judge, and that this court has no jurisdiction to try the same: *Held* on demurrer plea good, the plaintiff under the facts stated being restricted by section 50 of the Insolvent Act of 1869, to the remedy there given: *Held* also that that section was not beyond the power of the Dominion Parliament as being an interference with property and civil rights, but was within their exclusive authority over bankruptcy and insolvency (*Crombie* vs. *Jackson*, 34 Q. B. U. C. 575).

Where future advances are made after a mortgage by deposit of deeds, the mortgagee may show by parol evidence that it was agreed to extend the security to the subsequent advances (*Ex parte Kensington*, 2 V. & B. 79; *ex*

parte Lloyd, 1 Gl. & J. 389 ; *ex parte Langston*, 17 Ves. 227 ; *ex parte Nettleship*, 2 M. D. & D. 124 ; See *James* vs. *Rice*, Kay 231, 5 D. M. & G. 461).

If deeds are deposited to secure the payment of accommodation bills, and the latter are renewed at the request of the depositor, the security will extend to the renewed bills (*Ex parte Skinner*, 1 D. & C. 403. See *ex parte Lloyd*, 1 G. & J. 389).

The rule as to future advances is different where there is a legal mortgage. In such cases the security cannot be extended to future advances by parol evidence (*Ex parte Hooper*, 2 Rose, 328).

An equitable mortgage may also be created by the deposit of a policy of insurance so as to entitle the depositee to the moneys assured (*Gibson* vs. *Overbury*, 7 M. & W. 555 ; Robson 2 Ed. 263–4).

A security by way of pledge is a species of mortgage ; and is created by the mere delivery of goods or chattels to some other person as a security for money advanced or to be advanced. It differs from a lien in that it can be created only by express contract, whereas a lien may arise by operation of law, it differs also from a mortgage in that it vests in the pledgee a special property only at law in the thing pledged which entitles him to retain it until he is paid (*Coggs* vs *Barnard*, Ld. Ray. 909), and if default is made in payment by the pledgor at the stipulated time to sell the pledge and appropriate the proceeds in payment of his debt (*Tucker* vs. *Wilson*, 1 P. Wims. 261, *Franklin* vs. *Neate*, 13 M. & W. 481).

Liens are divided into two classes namely, common law or retaining liens and equitable liens.

A common law lien attaches only to goods and chattels ; and as a general rule gives no right to sell, but only to retain the chattel until the debt in respect of which it is claimed is paid (*The Thames Iron Works* vs. *Patent Derrick Co.*, 1 J. & H. 93). It may be a specific lien, that is a lien over specific goods for specific charges, or a general lien extending to the general balance due to the creditor. Specific liens are favoured by the Courts, whilst general liens are discouraged (*Houlditch* vs. *Milne*, 3 Esp. 86).

Specific liens are generally those of tradesmen upon specific goods in their hands for their labour and expense in improving or altering them (*Hiscox* vs. *Greenwood*, 4 Esp. 174), as a coachmaker for work on carriages sent to repair (*Houlditch* vs. *Milne*, supra). Auctioneers have a lien on the goods for their commission and charges (*Lane* vs. *Trewson*, 12 Ad. & E. 116 *n* ; *Williams* vs. *Wellington*, 1 H. Bl. 81 ; *Dicks* vs. *Richards*, 5 Scott, N. S. 534).

A lien being inconsistent with the giving of credit, if a usage exists in a particular trade for repairs or other work to be done on credit, no lien will attach in respect of such repairs or work (*Rabbitt* vs. *Mitchell*, 4 Camp. 146 ; *Crawshay* vs. *Homfray*, 4 B. & Ald. 50).

Persons, who by-law are compelled to receive goods, and perform some service in respect of them such as carriers who have a lien on the goods (*Aspinall* vs. *Pickford*, 3 B. & P. 44 n ; *Kirkman* vs. *Shawcross*, 6 T. R. 17 ; *Oppenheim* vs. *Russell*, 3 B. & P. 42 ; *Wright* vs. *Snell*, 5 B. & Ald. 350). Innkeepers have a lien on the luggage and horses of guest (*Thompson* vs. *Tracy*, 3 B. & Ald. 283 ; *Proctor* vs. *Nicholson*, 7 C. & P. 67), and this lien is extended to boarding-house keepers by 37 Vict. Ont., chap. 11.

The vendor of goods sold for ready money has a lien on them until they are actually delivered to the purchaser (*Ellis* vs. *Hunt*, 3 T. R. 464 ; *Glubry* vs. *Heyward*, 2 H. Bl. 504 ; *Hanson* vs. *Meyer*, 6 East, 614 ; *Dixon* vs. *Yates*, 5 B. & Ad. 313).

A general lien is created in favour of a factor as to all goods of his principal coming into his possession (*Kirkman* vs. *Shawcross*, 6 T. R. 14). A banker has a general lien on all securities deposited with him by a customer (*Davis* vs. *Bawsher*, 5 T. R. 488 ; *Scott* vs. *Franklin*, 15 East, 428 ; *Bolland* vs. *Bygrave*, Ry. & M. 271). An attorney has a general lien for costs upon all deeds, papers and money in his hands (*Hollis* vs. *Claridge*, 4 Taunt, 807 ; *Stevenson* vs. *Blakelock*, 1 M. & S. 535 ; *Champertown* vs. *Scott*, 6 Mad. 93 ; *Ex parte Underwood*, De G. 190 ; *Ex parte Bowden*, 2 D. & C. 182).

Equitable Liens.

An assignment for valuable consideration of a debt, not assignable at law gives in equity a lien to the Assignee on the debt, and the debtor on notice of the assignment is bound to recognise the right of the Assignee (*Ryal* vs. *Rowles*, 1 Ves. 348 ; *Meux* vs. *Bell*, 1 Hare, 73 ; *Gardner* vs. *Lachlan*, 1 M. & Cr. 129 ; *Jones* vs. *Farrell*, 1 D & J. 208 ; *Burns* vs. *Cawalho*, 1 M. & Cr. 690).

An assignment for value by the owner of goods will upon notice of the assignment to the party having the custody of the goods give a lien on them to the Assignee (*Langton* vs. *Horton*, 1 Hare, 549 ; *Ex parte Flower* 2 M. & A. 224 ; *Belcher* vs. *Bellamy*, 2 Exch. 303, *Acraman* vs. *Bates*, 2 El. & El. 456. See *Oldfield* vs. *Belcher*, 6 Bing, N. C. 102).

If a creditor has power at law to sell the property comprised in his security, he may realize by sale without applying to the Court, and then prove for the deficiency (*Ex parte Geller*, 2 Mad. 266 ; *Ex parte Rolfe*, 3 M. & A. 311 ; *Ex parte Johnson*, 3 D. M. & G. 218 ; *Ex parte Sheppard*, 2 M. D. & D. 431 ; *Ex parte Moffatt*, 1 ib. 282).

The Court has power to order a sale of the mortgaged estate of an insolvent, where it is for the benefit of the estate (*Ex parte Bacon*, 2 D. & C. 181 ; See *Ex parte Moore*, ib 7), or the mortgagee desires leave to bid (*Ex parte Davis*, 1 M. & A. 89 ; *Ex parte Hodgson*, 1 G. & J. 12).

Although a mortgagee with a power of sale may sell under the power, he cannot, upon a sale under the power, purchase or employ any person to purchase the property on his own account (*Ex parte Francis*, 1 D. & C. 274 ; *Ex parte Pedder*, 1 M. & A. 327).

If a mortgagee, selling under his power, buys, the court will order the property to be put up again at the price bid by the mortgagee ; and if no more is offered it will hold him to his bargain (*Ex parte Francis* ; *ex parte Pedder*, supra). The same incapacity to purchase applies also to any creditor having a pledge who sells it independently of the court.

Under the English Act, creditors holding bonds, bills, or other personal chattels deposited with them by way of security, or goods left in their hands as security, may apply for a sale thereof, with liberty to prove for any deficiency (*Ex parte Towgood*, 19 Ves. 231 ; *ex parte Twining*, 1 M. D. & D. 691). If any creditor, having such securities, has power at law to sell the property, he may realize it by sale without applying to the court, and then prove for the deficiency under the bankruptcy. If there has been any fraud in the sale it may be made the subject of inquiry ; and if the creditor sells improvidently the trustee may have an action against him for damages (*Ex parte Geller*, 2 Mad. 266 ; *ex parte Rolfe*, 2 M & A. 311 ; *ex parte Johnson*, 3 M. D. & G. 218 ; *ex parte Sheppard*, 2 M. D. & D. 431 ; *ex parte Moffatt*, 1 M. D. & D. 282).

Where a mortgagor becomes bankrupt the mortgagee may, instead of filing his claim, exercise the power of sale contained in his mortgage. An injunction to restrain such a sale was refused (*Gordon* vs. *Ross*, 1 L. J. U. C. [N. S.] 106).

The insolvent, in February, 1868, made a mortgage on lands and an assignment of goods to trustees for the benefit of B, G & Co. and other creditors named, and in August following he made a voluntary assignment under the Insolvent Act. The trustees, after this assignment, sold part of the real estate under the power of sale, and received part of the goods. B, G & Co. then claimed to prove against the estate for the balance due to them above what they had received from the trustees. The Official Assignee held that they had lost their right, having elected to look to their security instead of bringing it under section 5, sub-sec. 5 of the Insolvent Act of 1864 ; and his award was affirmed by the county judge on appeal : *Held* on appeal to the Court of Queen's Bench, that

the mere fact of the sale did not necessarily exclude them from proof, but that the securities sold might yet be valued, and if the estate had not been prejudiced or were recompensed for any loss thereby, they should still be allowed to prove (*In re Hurst*, 31 Q. B. U. C. 116).

A creditor of a liquidating debtor, who, before the presentation of the petition, has obtained a garnishee order affecting money accruing due to his debtor, but who has not obtained an order for payment by the garnishee, is not a secured creditor within the meaning of the English Bankruptcy Act of 1869 (*Ex parte Greenway*, L. R. 16 Eq. 619).

In cases where the creditor holds the security of a third party, he may prove the whole debt against the bankrupt's estate, and apply to his security for any deficiency (*Ex parte Goodman*, 3 Mad. 373 ; *ex parte Biddulph*, 3 D. & G. 587 ; *ex parte Adams*, 3 M. & A. 164 ; *ex parte English & American Bank*, L. R. 4 Ch. Ap. 49).

If, however, the creditor realizes his security before proving against the bankrupt's estate, he can only prove for the balance remaining unpaid (*Ex parte Todd*, 2 Rose, 202 ; *ex parte Leers*, 6 Ves. 644 ; *ex parte Taylor*, 1 D. & J. 302 ; but see *ex parte Prescott*, 4 D. & C. 23. See *ex parte Rufford*, 1 G. & J. 41).

If the creditor holds bills on which the bankrupt and other persons are liable as collateral security for his debt, and he proves for his whole debt, and one of the bills is afterwards paid, his proof will be reduced by the amount of such bill (*Ex parte Brunskill*, 2 M. & A. 220 ; *ex parte Barratt*, 1 Gl. & J. 327).

In the administration of the property of partners their joint and separate estates are considered as distinct estates, and, therefore, if a joint creditor has security upon the separate estate of one partner, he will be entitled to prove against the joint estate without giving up his security. And so in the converse case a separate creditor of one partner having a security on the joint estate can prove against the separate estate of such partner without giving up his security (*Ex parte Peacock*, 2 G. & J. 27 ; *ex parte Adams*, 3 M. & A. 157 ; *ex parte Bowden*, 1 D. & C. 135 ; *ex parte Halifax*, 2 M. D. & D. 544 ; *ex parte Davenport*, 1 M. D. & D. 313 ; *ex parte English & American Bank*, L. R. 4 Ch. Ap. 50 ; *Bank of Australasia* vs. *Flower*, L. R. 1 C. P. 27 ; Robson, 2 Edit. 256-296).

In general permission will not be given to a creditor who has proved his whole debt, to withdraw his proof and set up his security, but under special circumstances this has been allowed as where the creditor has proved in ignorance of the existence of the security (*Grugeon* vs. *Gerrard* 4 Y. & C. 419 ; *ex parte Davenport*, 1 M. D. & D. 313).

A creditor holding a security may, under this 84th sect., put a value on his security and he is then deemed a creditor only in respect of the balance due to him after deducting the value at which he assesses the security. If he values his security and claims to rank for the balance, the Assignee may require from the creditor an assignment of the security at an advance of ten per cent on such specified value, to be paid as soon as the security is realized.

The clause as to a creditor "holding a claim *based upon negotiable instruments*, upon which the insolvent is only indirectly or secondarily liable" enables the creditor immediately upon the maturity and non-payment of the instrument by which the liability is created to withdraw any proof he may have fyled, and to re-value his claim.

Under the 60th sect of the Act of 1869, immediately upon the maturity and non-payment of the instrument he was entitled to amend his claim and treat such liability as unsecured.

If the security is on realty or shipping.

85. But if the security consists of a mortgage upon real estate, or upon ships or shipping, the property mortgaged shall only be assigned and delivered, to the creditor, subject to all previous mortgages hypothecs and liens thereon, holding rank and priority before his claim, and upon his assuming and binding himself to pay all such previous mortgages, hypothecs and liens, and upon his securing such previous charges upon the property mortgaged, in the same manner and to the same extent as the same were previously secured thereon; and thereafter the holders of such previous mortgages, hypothecs and liens, shall have no further recourse or claim upon the estate of the insolvent; and if there be mortgages, hypothecs or liens thereon, subsequent to those of such creditor, he shall only obtain the property by consent of the subsequently secured creditors; or upon their filing their claims specifying their security thereon as of no value, or upon his paying them the value by them placed thereon; or upon his giving security to the Assignee that the estate shall not be troubled by reason thereof.

This section is a re-enactment of the 61st section of the Act of 1869. See notes to section 77.

Proceedings on the filing of a secured claim.

86. Upon a secured claim being filed, with a valuation of the security, it shall be the duty of the Assignee to procure the authority of the inspectors or the creditors at their first meeting thereafter, to consent to the retention of the security by the creditor, or to require from him an assignment and delivery thereof; and if any meeting of inspectors or creditors takes place without deciding upon the course to be adopted in respect of such security the Assignee shall act in the premises according to his discretion and without delay.

This section is a re-enactment of the 62nd section of the Act of 1869. (See notes to section 84.)

Rank of several items of a creditor's claim.

87. The amount due to a creditor upon each separate item of his claim at the time of the execution of a deed of assignment, or of the issue of a writ of attachment, as the case may be, and which shall remain due at the time of proving such claim shall form part of the amount for which he shall rank upon the estate of the insolvent, until such item of claim be paid in full, except in cases of deduction of the proceeds or of the value of his security, as hereinbefore provided; but no claim or part of a claim shall be permitted to be ranked upon more than once, whether the claim so to rank be made by the same person or by different persons; and the Assignee may at any time require from any creditor a supplementary oath declaring what amount, if any, such creditor has received in payment of any item of the debt upon which his claim is founded, subsequent to the making of such claim, together with the

Oath of creditor as to non payment of his claim.

particulars of such payment; and if any creditor refuses to produce or make such oath before the Assignee within a reasonable time after he has been required so to do, he shall not be collocated in the dividend sheet.

This section is a re-enactment of the 63rd section of the Act of 1869. (See notes to sections 80 and 84 supra, where the creditors' position in respect to the Insolvent's estate is fully discussed.)

Insolvent owing debts as a partner.

88. If the Insolvent owes debts both individually and as a member of a co-partnership, or as a member of two different co-partnerships, the claims against him shall rank first upon the estate by which the debts they represent were contracted, and shall only rank upon the other after all the creditors of that other have been paid in full.

This section is a re-enactment of the 64th section of the Act of 1869.

The appellants in the matter of C. & Co., insolvents, had a claim upon a note made by C. & Co., payable to C., one of the firm, and by him endorsed to the appellants. They proved against the firm, on 3rd July, 1869, but afterwards withdrew it, and proved, on 11th January, 1870, under section 60 of the Act of 1869: *Held* that the appellants, under the Act of 1864, could not rank both upon the separate estate of C. and on the estate of the firm, but must elect, and that they might prove against the firm for the full amount without deducting from it the value of C.'s separate liabilities (*In re Chaffey et al.* 30 Q. B. U. C. 64).

The doctrine of double proofs applies only when both estates are being administered in insolvency. A creditor who has proved, in insolvency, upon a promissory note, made by an insolvent firm, can prove as a creditor, on an administration suit, against one of the parties deceased, who has separately endorsed the note (*Re Baker*, 3 Chy. Chamb. 499).

The rule in equity, as well as in bankruptcy, is that the separate estate of a partner is to be applied first in discharge of his separate debts, and, in applying this rule, money paid by co-partners, on a liability created by the fraud of a partner towards them, is treated as a separate debt, proveable and payable *pari passu*, with the other separate creditors

of such partner, in case of his death insolvent. The mere liability, so fraudulently created, cannot be proved against the separate estate as a debt until the liability is paid, or until something equivalent to payment takes place. Where the fraud was in the use of the partnership name on bills, the other partners becoming insolvent, the holders of the bills proved them against the partnership estate. The Assignee, in a suit for administering the separate estate of the guilty partner, claimed to prove the amount against the separate estate. But the Master restricted the proof to the expected dividend from the partnership estate and the separate estate of the surviving partners, and the court held that the Assignee was not entitled to prove for a larger sum (*Baker* vs. *Davbarn*, 19 Grant, 113 ; and see *Allan* vs. *Garratt*, 30 Q. B. U. C. 165).

The general rule is, that by the bankruptcy of one partner the partnership is dissolved as to all the partners.

Where the members of a firm are separately adjudged bankrupt, the Assignee of them all cannot recover in one action debts due to the firm and debts due to the partners separately. The Assignee of each partner must sue alone for the recovery of debts due to him only (*Handcock* vs. *Haywood*, 3 T. R. 433).

When a firm, or two or more partners of it, are jointly placed in insolvency, all the joint property of the bankrupts, as well as the separate property of each of them, vests in the Assignee (*Graham* vs. *Mulvaster*, 4 Bing. 115). One of two partners, a few days before a writ of attachment against both, under the Insolvent Act of 1864, had issued, assigned his estate for the benefit of his creditors, and it was held that this assignment was void as against the joint-assignees (*Wilson* vs. *Stephenson*, 12 Grant, 239.)

In a firm of two partners where one dies and the other becomes bankrupt the Assignees of the latter are entitled to institute a suit on behalf of themselves and of all the other creditors of the deceased against his executors for the administration of the estate (*Addes* vs. *Knight*, 2 W. R. 119), and in such case the Assignees do not become partners with the solvent partner, but tenants in common (*Fox* vs. *Hanbury*, Cowp. 448).

The Assignees of a bankrupt partner are entitled to an account not only of the assets as they stood at the time of the dissolution of the firm, but also of the profits subsequently made by the employment of the bankrupt's capital in the partnership business (*Crawshaw* vs. *Collins*, 15 Ves. 218).

The solvent partners can always be summoned before the court, and be compelled to produce partnership books and to answer questions relative to the dealings of the firm (*Ex parte Trueman*, 1 D. & C. 464).

Unless the solvent partners have misconducted themselves or are dead or abroad the Assignees have no right to interfere in winding up the business, and if they do a court of equity will restrain them at the instance of the solvent partner (*Allan* vs. *Kilbee*, 4 Mad. 464).

Nor can the Assignees compel the solvent partner to deliver up the books of the partnership (*Ex parte Finch*, 1 D. & C. 274).

This has been questioned in the case of solicitors (*Davidson* vs. *Napier*, 1 Sim. 297).

And see notes to Section 84.

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89. The creditors, or the same proportion of them that may grant a discharge to the debtor under this Act, may allot to the Insolvent, by way of allowance, any sum of money, or any property they may think proper; and the allowance so made shall be inserted in the dividend sheet, and shall be subject to contestation like any other item of collocation therein, but only on the ground of fraud or deceit in procuring it, or of the absence of consent by a sufficient proportion of the creditors.

Allowance to Insolvent, how made.

This section is a re-enactment of the 65th section of the Act of 1869.

The number of creditors required to grant a discharge is the majority in number over $100.00 who represent three-fourths in value of the liabilities of the insolvent.

See Sections 49 and 52, supra.

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90. No costs incurred in suits against the insolvent after due notice has been given, according to the provisions of this Act, of an assignment, or of the issue of a writ of attachment in liquidation, shall rank upon the estate of the insolvent; but all the taxable costs incurred in proceedings against him up to that time shall be added to the demand for the recovery of which such proceedings were instituted; and shall rank upon the estate as if they

As to costs in suits against insolvent, after notice under this Act.

formed part of the original debt, except as herein otherwise provided.

This section is similar to the 66th section of the Act of 1869. The words "as herein otherwise provided" are new.

Privilege of clerks, etc., for wages.

91. Clerks and other persons in the employ of the insolvent in and about his business or trade shall be collocated in the dividend sheet by special privilege for any arrears of salary or wages due and unpaid to them at the time of the execution of a deed of assignment, or of the issue of a writ of attachment under this Act, not exceeding three months of such arrears, and also for such salary or wages for a period not exceeding two months of the unexpired portion of the then current year of service—during which period they shall be bound to perform, under the direction of the Assignee, any work or duty connected with the affairs of the insolvent, and which the insolvent himself might have directed them to perform under their respective engagements; and for any other claim they shall rank as ordinary creditors.

They may be employed.

By the 67th section of the Act of 1869, they might rank for 4 months' arrears of wages and such privileged amount might be increased by authority of the creditors. The above provision, as to the two-months of the unexpired portion of the current year is new. A demand for wages was made as a preferred claim to an Assignee; the creditors at a meeting passed a resolution authorising the Assignee to pay all claims for wages, but the Assignee refused payment of this claim as made; at this time, no dividend sheet had been prepared: *Held* that the direction by the creditors to pay these claims without putting them on the dividend sheet was illegal (*In re Cleghorn and the Judge of the County of Elgin and Munn*, 2 U. C. L. J., [N. S.] 133).

Under the English Acts, which contain similar provisions, it has been

held that weekly or daily labourers or workmen are not within the clause, neither are workmen who are paid by the job without being hired for any specific time (*Ex parte Grellier*, Mont. 264 ; M. & Mc. 95). Something more permanent than a weekly hiring is requisite, but a yearly hiring is not necessary (*Ex parte Collier*, 4 D. & Ch. 520 ; 2 M. & A. 30). If, however, there is a general hiring the case will be within the clause, although the wages may be payable weekly (*Ex parte Humphreys*, 3 D. & Ch. 115 ; M. & Bl. 413).

The misconduct of the clerk may deprive him of the benefit of this provision (*Ex parte Harrison*, 2 M. D. & D. 462). Where the clerk had left the service several months before the bankruptcy, but the leaving was not voluntary he was held to be within this section (*Ex parte Saunders*, 2 Mon. & A. 684).

The contract is not dissolved by the bankruptcy of the master, but it will continue in force until determined. A clerk or servant will therefore, notwithstanding his master's discharge, be entitled to recover such proportion of his wages, as may have accrued after the bankruptcy, not provable under it (*Thomas* vs. *Williams*, 1 Ad. & E. 685).

By special privilege, this expression, as far as the Province of Quebec is concerned, confines the privilege to the proceeds of the personal property of the insolvent among or upon which such clerk or servant may have been engaged, for example, to that of the stock in trade, where the creditor is a clerk or storeman, and to that of the household effects, where the claimant is a domestic servant (Popham, 94 and see sections 82 & 83, supra).

Notice of dividend sheet and payment.

92. So soon as a dividend sheet is prepared, notice thereof (Form O) shall be given by advertisement, and by letter posted to each creditor, inclosing a copy of the dividend sheet noting the claims objected to, and after the expiry of eight days from the day of the last publication of such advertisement, all dividends which have not been objected to within that period shall be paid.

This section differs from the 68th section of the Act of 1869, in that notice to be posted to each creditor inclosing a copy of the dividend sheet, noting the claims objected to, and the time for payment of the dividend,

is eight days from the expiry of the last publication of the advertisement, instead of one day, as required by that section. For the manner of publishing this advertisement, see section 101, infra. Without due notice by advertisement according to the form prescribed, the dividend sheet is incomplete, and conveys no right to any creditor.

The court may, on petition of a creditor, therefore, prohibit payments being made thereon (*Larivière* vs. *Whyte & McEvila*, XI. L. C. Jur. 265). *Held* that an action may be brought against an Assignee for a dividend on a duly collocated and advertised claim, which has not been objected to (*Simpson* vs. *Newton*, 4 U. C. L. J. [N. S.] 46).

Contestation of claims by Assignee, under inspectors' instructions.

93. It shall be the duty of the inspectors to examine with the Assignee the claims made against the estate, and also each dividend sheet before the expiration of the delay within which the same may be objected to, and to instruct the Assignee as to which claims or collocations should be contested by and on behalf of the estate, whereupon contestation shall be entered and made in the name of the Assignee or of the inspectors, or of some individual creditors consenting thereto, and shall be tried and determined by the court or judge; and the costs of such contestation, unless recovered from the adverse party, shall be paid out of the funds belonging to the estate.

By the 72nd section of the Act of 1869, the contestation was tried and contested before the Assignee in the first instance, from whose award there was an appeal to the judge. Now, by the above section, the contestation takes place before the judge in Ontario or before the court in Quebec.

Claims not filed, how dealt with.

94. If it appears to the Assignee, on his examination of the books of the insolvent, or otherwise, that the insolvent has creditors who have not taken the proceedings requisite to entitle them to be collo-

cated, it shall be his duty to reserve dividends for such creditors according to the nature of their claims, and to notify them of such reserve, which notification may be by letter through the post, addressed to such creditors' residences as nearly as the same can be ascertained by the Assignee; and if such creditors do not file their claims and apply for such dividends previous to the declaration of the last dividend of the estate, the dividends reserved for them shall form part of such last dividend.

This section is a re-enactment of the 69th section of the Act of 1869. This should not be construed to mean that if the creditor does not demand his dividend, as well as file his claim, he will be deprived of it, for that would place this class of creditors in a different position from others. But the filing of the claim should be held to be an application for a dividend under this clause, and if the claimant does not afterwards claim the amount awarded him, the rule as to unclaimed dividends must be followed (Abbott, page 44).

Claims on dividends objected to, how determined.

95. If any claim be objected to at any time, or if any dividend be objected to within the said period of eight days, or if any dispute arises between the creditors of the insolvent, or between him and any creditor, as to the amount of the claim of any creditor, or as to the ranking or privilege of the claim of any creditor upon such dividend sheet, the objection shall be filed in writing by or before the Assignee, who shall make a record thereof; and the grounds of objections shall be distinctly stated in such writing, and the party objecting shall also file at the same time the evidence of previous service of a copy thereof on the claimant; and the claimant shall have three days thereafter to answer the same,

which time may, however, be enlarged by the judge, with a like delay to the contestant to reply; and upon the completion of an issue upon such objection, the Assignee shall transmit to the clerk of the court the dividend sheet, or a copy thereof, with all the papers and documents relating to such objection or contestation; and any party to it may fix a day, of which two days' notice shall be given to the adverse party, for proceeding to take evidence thereon before the judge, and shall thereafter proceed thereon from day to day until the evidence shall have been closed, the case heard and the judgment rendered, which judgment shall be final, unless appealed from in the manner hereinafter provided: the proceedings on the said objection or contestation shall form part of the records of the court, and the judgment shall be made executory as to any condemnation for costs, in the same manner as an ordinary judgment of the court.

Hearing and decision thereon.

Judgment executory.

By the 70th section of the Act of 1869 the time for objecting to a dividend was after last day of publication of advertisement, instead of eight days as above; and that section provides that the Assignee shall examine the parties and their witnesses under oath, and shall make an award as to contested claims and dividends. The 71st section of that Act points out when the Assignee shall receive a notice of such objection.

The contestation and other pleadings should meet the requirement for all legal documents—namely, a specification of time, place, person and circumstance. These may be described in plain and concise language, and no evidence can be received upon any fact not so set forth (see section 114, infra).

The Assignee is empowered to hear and examine the parties and their witnesses under oath, and he should do so in the manner usual in litigation, observing the ordinary and reasonable rules as to evidence, of which the following may be stated as of the highest practical importance, and as requiring to be referred to oftenest in ordinary cases:

1. That the burden of proof shall be upon him who affirms a proposition of fact rather than upon him who denies it.

2. That the party upon whom is the burden of proof shall begin.

3. That the party who begins shall have the right to adduce the evidence in rebuttal, but such evidence shall only be such as tends to destroy the case of his opponent, and not such as tends directly to sustain his own.

4. That the party who holds the negative cannot usually adduce evidence in reply to his adversary's evidence in rebuttal.

5. That if the parties are examined they cannot make evidence for themselves, but that their answers cannot be divided.

6. That the best evidence of which the case is susceptible should be adduced, and that secondary evidence should not be received until proof is made that the best evidence cannot be obtained.

7. That on the examination of a witness in chief, leading questions are not usually permissible, but may be put on cross-examination. This rule, however, may be reversed if the witness is plainly hostile to the party who produces him and favourable to his opponent.

It would be obviously impossible here to enter into a detailed discussion of the law of evidence, but enough has been said to indicate the order in which the proceedings should be carried on before the Assignee. If the dispute be conducted by counsel the Assignee will be called upon to decide questions as to the admissibility of evidence, and as to the propriety of questions put to witnesses which might raise doubts even in the mind of a judge accustomed to deal with them. In such cases, if the objection be to the admissibility of evidence, it would be better for the Assignee to admit it, entering the objection to its admission. If it be to the propriety of a question it is better to permit it to be put if the Assignee has any doubt, entering the objection, and if it be an objection to the form of the question it is always safe to insist that the question shall be so framed as to leave the facts to be related by the witness, and not put into his mouth by the questioner, and the Assignee should always recollect that it is easy afterwards to disregard testimony improperly admitted, but that the exclusion of that which ought to have been let in is not susceptible of so simple a remedy (Abbott, p. 45).

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96. The creditors, and in their default the inspectors, may by resolution authorize and direct the costs of the contestation of any claim or of any

Creditors or inspectors may order contestation

of claims, &c.

dividend, to be paid out of the estate, and may make such order either before, pending, or after any such contestation; they may also, with the sanction of the judge, authorize the payment out of the estate of any costs incurred for the general interest of the estate, whether such costs were incurred by the Assignee, the inspectors or any individual creditor.

The 73rd section of the Act of 1869 contains a similar clause to the above empowering the creditors to direct that the costs of the contestation of any claim or dividend should be paid out of the estate. The power given them to authorize payment out of the estate of any costs incurred for the general interest of the estate is new.

If there be property of Insolvent under seizure at time of assignment or attachment; Proceedings.

97. If, at the time of the issue of a writ of attachment, or the execution of a deed of assignment, any immovable property or real estate of the insolvent be under seizure, or in process of sale, under any writ of execution or other order of any competent court, such sale shall be proceeded with by the officer charged with the same, unless stayed by order of the judge upon application by the Assignee, upon special cause shewn, and after notice to the plaintiff,—reserving to the party prosecuting the sale his privileged claim on the proceeds of any subsequent sale, for such costs as he would have been entitled to out of the proceeds of sale of such property, if made under such writ or order; but if such sale be proceeded with, the moneys levied therefrom shall be returned into the court on whose order the sale has been made, to be distributed and paid over to the creditors who shall have any privilege, mortgage or hypothecary claims thereon, according to the rank and priority of such claims; and the balance of such moneys after the payment

of such claims shall be ordered to be paid to the Assignee to be distributed with the other assets of the estate.

This section follows the 74th section of the Act of 1869, except that the proceeds of the sale are paid into the court on whose order the sale has been made, instead of to the Assignee.

M. under a *Fi. Fa.* at his own suit against D. which was the first in the sheriff's hands, purchased certain lands in September, 1867, D. had, in April previous, made a voluntary assignment under the Insolvent Act of 1864, to an Official Assignee who claimed the proceeds of the sale under the amended Act of 29 Vic. cap. 18, sec. 17. M. claimed a conveyance from the sheriff crediting the purchase money on his judgment. The court under these circumstances discharged with costs an application by M. for a mandamus to compel the sheriff to convey, to which the Assignee was no party (*In re Moffatt and the Sheriff of the County of York*, 27 Q. B. U. C. 52).

When a sale has been had under an execution against a debtor, who after the sale makes an assignment, the proceeds of the sale are not vested in the Assignee, but go to the judgment creditors (*Sinclair* vs. *McDougall*, 29 Q. B. U. C. 388 ; *Brand* vs. *Bickle*, 4 P. R. 191). But see sections 82 and 83 and notes.

When previous to an act of insolvency certain lands in which the insolvent, a defendant in a suit in chancery, had an equitable interest, had been ordered to be, and were afterwards sold and the purchase money paid to the plaintiff in equity, the Assignee in insolvency moved that such moneys be paid into court for the benefit of the general creditors : *Held* that such lands were subject to the order for sale and the motion refused with costs (*Yale* vs. *Tollerton*, 2 Chy. Cham. 49).

The mortgagor of land having made an assignment in insolvency subsequent, however, to the execution of the plaintiff, and it appearing that there was a surplus after payment of all claims proved against the lands in the suit by the prior mortgagee : it was held that, in the absence of proof of waiver by the plaintiff of his rights, the plaintiff was entitled in priority as against the creditors of the mortgagor under the assignment in insolvency (*Darling* vs. *Wilson*, 16 Chy. 255).

See *Converse* vs. *Michie*, 16 C. P. 167 ; *Whyte* vs. *Treadwell*, 17 C. P. 488 ; *Henry* vs. *Douglas*, 1 L. J. U. C. [N. S]. 108 ; *in re Fair & Buits*, 2 U. C. L. J. [N. S]. 216 ; *Blakely & Hall*, 21 C. P. 136 ; *Patterson* vs. *McCarthy*,

35 Q. B. U. C. 14 ; *in re Hayden*, 29 Q. B. U. C. 262 : cited under section 83 infra, *Thorpe* vs. *Torrance*, 18 C. P. U. C. 29 ; *Brand* vs. *Bickle*, 21 C. P. U. C. 138 ; *Sinclair* vs. *McDougall*, 29 Q. B. U. C. 388.

On 30th January, 1865, W. B. executed, before a notary public in Lower Canada, to the plaintiff, Rose, an instrument which purported to be an assignment under the Act of 1864, but which was informal in several particulars. On 24th February following, defendant issued execution against the goods of W. B. and gave it to the sheriff. On 10th March following the other plaintiffs issued an attachment under the Insolvent Act, under which an Assignee was appointed, and on the same day the sheriff seized the goods of W. B. after the issue of the writ of attachment under the defendant's execution : *Held*, that the execution must prevail for that the subsequent proceedings in insolvency avoided the assignment to Rose, and the execution being in the sheriff's hands before the issuing of the attachment bound the goods at common law from its date, and under the statute of frauds, from the delivery to the sheriff (*Rose et al.* vs. *Brown*, 16 C. P. U. C. 477).

An execution was delivered to the sheriff against the goods of the defendant, upon which he seized certain goods. These goods were claimed by the guardian in insolvency of the estate of the defendant, against whom a writ of attachment under the Insolvent Act had also issued to the sheriff. The sheriff applied for relief under the Interpleader Act : *Held*, that under 28 Vict., chap. 19 sect. 2, he was entitled to protection and an issue was directed (*Burns* vs. *Steele*, 2 U. C. L. J. [N. S]. 189 ; *in re Ross*, 3 P. R. 394 ; *McWhirter* vs. *Learmouth*, 18 C. P. U. C. 136).

The plaintiff issued *Fi. Fa.* lands on 7th June, 1865, and renewed it from time to time until 4th June, 1867. On 30th March, 1867, defendant obtained his discharge in insolvency. Plaintiff had proved his claim for the full amount of the judgment in the Insolvent Court and had never attempted to take any proceedings under the writ which he refused to withdraw although requested to do so. The Court set aside the *Fi. Fa.* with costs (*Dickson* vs. *Bunnell*, 19 C. P. U. C. 216). In the case of a debtor dying leaving insufficient to pay his debts, execution creditors whose writs are in the sheriff's hands do not lose their priority, nor does a creditor who has a sequestration lose the advantage of it (*Meyers* vs. *Meyers* 19 Grant, 185 ; *Davidson* vs. *Perry*, 23 C. P. U. C. 346).

A plea to a declaration on a promissory note on equitable grounds in bar to the further maintenance of an action averring the pendancy of proceedings commenced by the plaintiff against the defendant under the Insolvent Act of 1864 for the same cause of action subsequently to the

declaration in the cause, was held a bad plea (*Baldwin* vs. *Peterman*, 16 C. P. U. C. 310).

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98. All dividends remaining unclaimed at the time of the discharge of the Assignee shall be left in the bank where they are deposited, for three years, and if still unclaimed, shall then be paid over by such bank, with interest accrued thereon, to the Government of Canada, and if afterwards duly claimed shall be paid over to the persons entitled thereto, with interest at the rate of four per centum per annum from the time of the reception thereof by the Government. Unclaimed dividends how dealt with.

This section is a re-enactment of the 75th section of the Act of 1869.

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99. If any balance remains of the estate of the insolvent, or of the proceeds thereof, after the payment in full of all debts due by the insolvent, such balance shall be paid over to the insolvent upon his petition to that effect, duly notified to the creditors by advertisement and granted by the judge. Balance of estate (if any) to be paid over to insolvent.

This section is a re-enactment of the 76th section of the Act of 1869. Where the estate of a bankrupt is sufficient to pay in full and a surplus remains, interest must be allowed on all debts proved under the commission, where the debt by express contract or by statute bears interest, or where a contract to pay it is implied, but on no other debt will interest be allowed (*Re Langstaff*, 2 Grant, 165).

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100. Whenever a meeting of creditors cannot be held, or an application made, until the expiration of a delay allowed by this Act, notice of such meeting or application may be given pending such delay. Notice pending delay.

This is a re-enactment of the 120th section of the Act of 1869.

Notices of meetings, &c., how given.

101. Notices of meetings of creditors shall be given by publication thereof for at least two weeks in the Official Gazette of the Province in which they are to take place, and by such other notice as the judge or inspectors may direct: and in every case of a meeting of creditors the Assignee shall address notices thereof to the creditors and to all the representatives within the Dominion of foreign creditors, and shall mail the same at least ten days before the day on which the meeting is to take place, the postage being prepaid by such Assignee: in other cases not provided for, the Assignee shall advertise as directed by the inspectors or the judge.

Cases unprovided for.

The 117th section of the Act of 1869 provides that all meetings of creditors, and all other notices required to be given by advertisement, without special designation of the nature of such notice, should be published in the Official Gazette, &c. That portion of the above section which provides for mailing notices at least ten days before the day of meeting, and that in other cases not provided for, the Assignee shall advertise, as directed by the inspectors or the judge, is new. That section also provides that in the Province of Quebec the advertisement should be published, both in English and in French, in newspapers at or nearest to where the insolvent has his chief place of abode: *Held* under the Act of 1864 that the county town of the county in which the assignment is filed is the place where the Assignee should call all meetings; that not less than two weeks should intervene between the first publication of the notice and the day of meeting: that the notice must be published in a newspaper at or nearest the place where the meeting is to be held (*In re Aikins*, 2 U. C. L. J. [N. S.] 25): *Held* by Draper, C. J., that the mailing of notices to creditors, provided by section 11, sub-section 1, of the Act of 1864, did not apply in application for a confirmation of discharge, or a discharge after a year from the assignment or issue of a writ of attachment (U. C. L. J. 1866, p. 42).

How questions shall be decided

102. All questions discussed at meetings of creditors shall be decided by the majority, in number

and in value, of the creditors having a right to vote under section two, present or represented at such meeting, and representing also the majority in value of such creditors, unless herein otherwise specially provided; but if the majority in number do not agree with the majority in value, the views of each section of the creditors shall be embodied in resolutions, and such resolutions, with a statement of the vote taken thereon, shall be referred to the judge who shall decide between them. at meetings.

The 118th section of the Act of 1869 provided that all questions discussed at meetings of creditors should be decided by the majority in number of all creditors of one hundred dollars and *upwards* present or represented at the meeting, and representing also the majority in value of such creditors, and by sub-sect. "h" of sect. 2 of this Act, the proportion in value is made of all claims under as well as over $100.

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103. If the first meeting of creditors, which takes place after the expiry of the period of three weeks from the first advertisement calling such meeting, be called for the ordering of the affairs of the estate generally, and it be so stated in the notices calling such meeting, all the matters and things respecting which the creditors may vote, resolve or order, or which they may regulate under this Act (except when otherwise specially provided), may be voted, resolved or ordered upon, and may be regulated at such meeting, without having been specially mentioned in the notices calling such meeting—due regard being had, however, to the proportions of creditors required by this Act for any such vote, resolution, order or regulation. What matters may be voted upon, &c., at first meeting of creditors.

This section is somewhat similar to the 121st section of the Act of 1869, except that the first meeting of creditors takes place after the expi-

ration of three weeks from the first advertisement calling such meeting, instead of one month from the advertisement of the appointment of an Assignee, as provided by that section.

Form and proof of claims.

104. The claims of creditors furnished to the Assignee in the Form P, attested under oath and accompanied by the vouchers on which they are based, or when vouchers cannot be produced accompanied by such affidavit or other evidence as in the opinion of the Assignee shall justify the absence of such vouchers, shall be considered as proved unless contested, in which case the claims shall be established by legal evidence on the points raised.

The requirement of the above section as to the production of vouchers is new. See section 122 of the Act of 1869. For the proper person to make this affidavit, see section 105 and notes to section 80, as to persons entitled to prove in insolvency.

Affidavits, before whom sworn.

105. Any affidavit required in proceedings in insolvency may be made by the party interested, his agent or other party having a personal knowledge of the matters therein stated, and may be sworn in Canada before the Assignee or before any Official Assignee, judge, notary public, commissioner for taking affidavits, or justice of the peace, and out of Canada before any judge of a court of record, any commissioner for taking affidavits appointed by any Canadian court, any notary public, the chief municipal officer for any town or city, or any British consul or vice consul, or before any person authorized by any statute of the Dominion or of any province thereof, to take affidavits to be used in any court of justice in any part of the Dominion.

This section agrees as to the persons before whom affidavits of claim may be taken with the 122nd section of the Act of 1869, with the addition that they may be taken before any Official Assignee and notary public, and goes considerably farther than the 123rd section, as to the persons before whom proceedings in insolvency may be sworn.

See notes to section 80, as to the persons entitled to prove claims.

Surrender of security by creditor, and effect thereof.

106. A creditor holding a mortgage, hypothec, lien, privilege or collateral security on the estate of a debtor, or on the estate of a third party for whom such debtor is only secondarily liable, may release or deliver up such security to the Assignee, or he shall by his affidavit for the issue of a writ of attachment, or by an affidavit filed with the Assignee at any time before the declaration of a final dividend, set a value upon such security; and from the time he shall have so released or delivered up such security, or shall have furnished such affidavit, the debt to which such security applied shall be considered as an unsecured debt of the estate or as being secured only to the extent of the value set upon such security; and the creditor may rank as and exercise all the rights of an ordinary creditor, for the amount of his claim, or to the extent only of any balance thereof above and beyond the value set upon such security, as the case may be.

This section is new. See notes to section 84.

Set-off, how allowed.

107. The law of set-off, as administered by the courts, whether of law or equity, shall apply to all claims in insolvency and also to all suits instituted by an Assignee for the recovery of debts due to the insolvent, in the same manner and to the same ex-

tent, as if the insolvent were plaintiff or defendant, as the case may be, except in so far as any claim for set-off shall be affected by the provisions of this Act respecting frauds or fraudulent preferences.

This section is somewhat similar to the 124th section of the Act of 1869, except that the above extends to equitable as well as legal set-off.

Before the amended Act of 1865, the right of set-off did not apply in insolvency as the statute introducing English Law into Canada passed 15th Oct., 1790, excepted the bankrupt laws, consequently creditors had before the amended Act of 1865, to pay the whole of the debts due by them, and receive only a dividend on the debts due to them. As a general rule for the purpose of set-off each of the parties must be debtor and creditor in the same right, but there are exceptions to this rule as in the case of a factor selling goods without disclosing his principal (*George* vs. *Claggett*, 7 T. R. 359), and debts due in separate rights may be set-off by special agreement (*Caxon* vs. *Chadley*, 1 C. & P. 174). But a debt due to a testator cannot be set-off against a debt owing by his executor (*Rogerson* vs. *Ludbroke*, 1 Bing. 93), nor a debt due a wife, *dum sola*, against a debt from her husband (*Ex parte Blagden*, 2 Rose, 249). Nor a partnership debt against the separate debt of one partner, and *vice versa* (*Abbott* vs. *Hicks*, 5 Bing. [N.C.] 578 ; 3 Jur. 87 ; *Ex parte Twogood*, 11 Ves. 517).

But the rule excluding set-off between joint and separate debts, does not apply to a surviving partner as the right to sue survives to him (*Slipper* vs. *Slidstone*, 5 T. R. 493).

All debts and demands proveable against the insolvent's estate may be set-off, but not otherwise (*Gibson* vs. *Bell*, 1 Bing. N. C. 753).

If a trustee proceeds against a debtor of the bankrupt, who claims a right of set-off, the latter may apply to the court to restrain the proceedings, and to give the necessary directions for giving effect to the set-off (*Ex parte Law*, De G. 578). But if the trustee has the option of proceeding either in assumpsit or in tort and adopts the latter form, it would seem that the defendant will not be allowed to avail himself of set-off, which he might have had if sued on contract (*Smith* vs. *Hodson*, 4 T. R. 211).

If a creditor having a right of set-off pays the debt owing by him to the bankrupt's Assignee under a mistake as to his rights, he may recover back the amount in an action against the trustee for money had and received to his use (*Bize* vs. *Dickason*, 1 T. R. 385).

Under the bankrupt laws it is immaterial that the demands are of a different nature, as where one is founded on specialty and the other on simple contract, or that they arise on different accounts, provided they arise in the same right (*Ex parte Pearce*, 2 M. D. & D., 142; *Pedder* vs. *Preston*, 12 C. B. N. S., 535.) So also it would seem to be immaterial on what consideration, provided it is not illegal, a debt is founded, or that the debt on one side has arisen out of fraud or tort, and not upon any contract (*Ryall* vs. *Rawles*, 1Ves. 375; *ex parte Whittaker*, 1 G. & J. 213; *ex parte Winton*, 1 M. & A. 440; *Owens vs Denton*, 1 Cr. M. & R. 711).

A debt payable *in futuro* can be set off against a debt payable *in præsenti*, on the ground that, though there may not be mutual debts actually payable between the parties, still there are mutual credits, so that the case comes within the equity of the statute (*Ex parte Prescot*, 1 Atk. 320; *Dobson* vs. *Lockhart*, 5 T. R. 133; *Alsager* vs. *Currie*, 12 M. & W. 751; *ex parte Wagstaff*, 13 Ves. 65; *Sheldon* vs. *Rothschild*, 8 Taunt. 156; *Atkinson* vs. *Elliott*, 7 T. R. 378).

An acceptance in the hands of an endorsee before, but which was not due until after, the bankruptcy of the acceptor, was held to constitute an item of credit between the bankrupt and the endorsee, on the ground that if a bill of exchange is accepted and goes out into the world, credit is given to the acceptor by every person who takes the bill (*Hankey* vs. *Smith*, 3 T. R. 507; *Collins* vs. *Jones*, 10 B. & C. 777; *Edmeads* vs. *Newman*, 1 B. & C. 418).

A debtor of the bankrupt will not be allowed to set off a bill or note endorsed or a debt transferred to him after the bankruptcy (*Marsh* vs. *Chambers*, Strange 1234; *Dickson* vs. *Evans*, 6 T. R. 57).

Mutual credits within the meaning of the bankrupt laws are credits which must terminate or at least have a natural tendency to terminate, in debts (*Naoroji* vs. *Bank of India*, L. R. 3 C. P. 444; *Gibson* vs. *Pell*, 1 Bing. N. C. 748; *Easum* vs. *Cato*, 5 B. & Ald. 861; *Smith* vs. *Hodson*, 4 T. R. 211).

A debt which becomes due to the bankrupt after his bankruptcy cannot be set off against a debt due from him before his bankruptcy (*Ex parte Rhodes*, 15 Ves. 539).

An executor may set off a debt due to his testator against a legacy bequeathed to a bankrupt or his wife, if the right to the legacy accrues before the bankruptcy (*Cherry* vs. *Boultbee*, 4 M. & C. 442; *Ranking* vs. *Barnard*, 5 Mad. 32; *Bousfield* vs. *Lewford*, 1 De G. & J. 459. See *Smee* vs. *Baines*, 7 Jur. [N. S.] 902). The term set off, however, appears to be inaccurately applied to cases of this kind. The right of the executor

in such cases is rather a right to retain or pay out of the fund in hand than to set off (*Cherry* vs. *Boultbee*, supra), and on this ground an executor was allowed to retain out of the share of the bankrupt residuary legatee a sum which the executor had lent to him out of the testator's assets (*Ex parte Makins*, 2 M. D. & D. 508). A right of set off as between the acceptor and drawer is not an equity attaching to the bill (*Ex parte Swan*, L. R. 6 Eq. 344; *Oulds* vs. *Harrison*, 10 Exchr. 574.

Service of papers under this Act.

108. Except when otherwise provided by this Act, one clear juridical day's notice of any petition, motion, order or rule, shall be sufficient if the party notified resides within fifteen miles of the place where the proceeding is to be taken, and one extra day shall be sufficient allowance for each additional fifteen miles of distance between the place of service and the place of proceeding; and service of such notice shall be made in such manner as is now prescribed for similar services in the Province within which the service is made.

This section is the same as the 125th section of the Act of 1869, except the words "except when otherwise provided for by this Act," which are not in that section.

Commissions for examination of witnesses.

109. The judge shall have the same power and authority in respect of the issuing and dealing with commissions for the examination of witnesses, as are possessed by the ordinary courts of record in the Province in which the proceedings are being carried on.

The issuing of commissions for the examination of witnesses in the courts of record in Ontario is regulated by chap. 32, Con. Stats. U. C. See secs. 19, 20 and 21 of that Act.

Subpœnas to witness.

110. In any proceeding or contestation in insolvency, the court or judge may order a writ of *sub-*

pœna ad testificandum or of *subpœna duces tecum* to issue, commanding the attendance as a witness of any person within the limits of Canada.

This section is similar to the 127th section of the Act of 1869 : except that the power is not given to the Assignee to order a writ to issue, as provided by that section.

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111. All rules, writs of subpœna, orders and warrants issued by any court or judge in any matter or proceeding under this Act, may be validly served in any part of Canada upon the party affected or to be affected thereby; and the service of them, or any of them, may be validly made in such manner as is now prescribed for similar services in the Province within which the service is made; and the person charged with such service shall make his return thereof under oath, or, if a sheriff or bailiff in the Province of Quebec, may make such return under his oath of office. Service of process, &c.

This section is the same as the 128th section of the Act of 1869 ; except that the words "or Assignee" in that section are omitted in this.

For the time for effecting such service, see section 108.

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112. In case any person so served with a writ of *subpœna* or with an order to appear for examination does not appear according to the exigency of such writ or process, the court or the judge on whose order or within the limits of whose territorial jurisdiction the same is issued, may, upon proof made of the service thereof, and of such default, if the person served therewith has his domicile within the limits of the Province within which such writ or process issued, constrain such person to appear Disobedience of writs and process, how punishable.

and testify, and punish him for non-appearance or for not testifying in the same manner as if such person had been summoned as a witness before such court or judge in an ordinary suit; and if the person so served and making default has his domicile beyond the limits of the Province within which such writ or process issued, such court or judge may transmit a certificate of such default to any of Her Majesty's superior courts of law or equity in that part of Canada in which the person so served resides, and the Court to which such certificate is sent, shall thereupon proceed against and punish such person so having made default, in like manner as it might have done if such person had neglected or refused to appear to a writ of *subpœna* or other similar process issued out of such last mentioned court; and such certificate of default attested by the court, judge or Assignee before whom default was made, and copies of such writ or process and of the return of service thereof certified by the clerk of the court in which the order for transmission is made, shall be *prima facie* proof of such writ or process, service, return, and of such default.

Proof of default.

This section is a re-enactment of the 129th section of the Act of 1869.

A person summoned as a witness cannot refuse to give evidence respecting his dealings with the insolvent, by alleging he is a creditor (*In Re Hamilton*, 1 U. C. L. J. [N. S.] 52).

Expenses must be tendered to person summoned as a witness, &c.

113. No such certificate of default shall be so transmitted nor shall any person be punished for neglect or refusal to attend for examination in obedience to any *subpœna* or other similar process, unless it be made to appear to the court or judge

transmitting, and also to the court receiving such certificate, that a reasonable and sufficient sum of money, according to the rate *per diem* and per mile allowed to witnesses by the law and practice of the superior courts of law within the jurisdiction of which such person was found, to defray the expenses of coming and attending to give evidence, and of returning from giving evidence, had been tendered to such person at the time when the writ of *subpœna*, or other similar process, was served upon him.

This is a re-enactment of the 130th section of the Act of 1869.

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114. The forms appended to this Act, or other forms in equivalent terms, shall be used in the proceedings for which such forms are provided; and in every contestation of a claim, collocation or dividend, or of an application for a discharge, or for confirming or annulling a discharge, the facts upon which the contesting party relies shall be set forth in detail, with particulars of time, place and circumstance; and no evidence shall be received upon any fact not so set forth; but in every petition, application, motion, contestation or other pleading under this Act, the parties may state the facts upon which they rely, in plain and concise language, to the interpretation of which the rules of construction applicable to such language in the ordinary transactions of life shall apply. Forms under this Act.

This is a re-enactment of the 131st section of the Act of 1869.

115. No plea or exception alleging or setting up any discharge or certificate of discharge, granted under the bankrupt or insolvent law of any country whatsoever beyond the limits of the Dominion, shall be a valid defence or bar to any action instituted in any court of competent jurisdiction in the Dominion for the recovery of any debt or obligation contracted within such limits. Foreign discharges not to bar debts contracted in Canada.

This is the same as the 132nd section of the Act of 1869.

A foreign law authorizing the discharge of an insolvent debtor must be directly proved, and the court will not listen to an application for the discharge of such person after he has allowed judgment to go by default and is in execution (*Brown* vs. *Hudson*, Tay. 346).

Where the person of an insolvent debtor is discharged from arrest by a foreign authority this court will not set aside an arrest made under the process of this court for the same cause of action, it not being bound to model or restrain its course of proceeding by that of other countries (*Ib.* 390).

An "act and warrant" under Imp. Act 19-20 Vict., c. 79 (Scotch Bankrupt Act), though containing no attestation clause without a witness to its execution, and specifying no lands in Upper Canada, is capable of registration (*Robson* vs. *Carpenter*, 11 Grant, 293).

To an action on notes against the makers, who were members of a firm carrying on business here and in Glasgow, one defendant pleaded on equitable grounds in substance that proceedings in bankruptcy had been commenced against them in Scotland, in the proper court there, and sequestration of their estates awarded, and a warrant of protection granted to them ; and that in such proceedings, which were still pending, the plaintiff duly proved his claim against them, including these notes. Another defendant set up a similar defence, but averring only that the plaintiff, who had notice of the proceedings, could and ought to have proved, and still might prove therein, for the notes declared on : *Held* on demurrer both pleas bad, for that a sequestration and warrant of protection under the Bankrupt (Scotland) Act, 1856, before a final discharge, formed no bar to this suit (*Robinson* vs. *McKeand et al*, 23 Q. B. U. C. 359).

To an action on a promissory note made in the United States, defendant pleaded his discharge under the bankrupt laws there ; to which the plaintiff replied, that by such law the discharge was fraudulent and void,

because the defendant, in the schedule attached to his petition, had fraudulently, and with intent to prevent the plaintiff from sharing in his estate or opposing his discharge, omitted any mention of the plaintiff or his claim. The omission was proved, and the law of the United States was stated to be that such omission, unless fraudulent and wilful, would not avoid the discharge; but it was not shown whether the assent of a certain number of the creditors or the payment of a certain dividend was requisite, or whether there was any provision which would show a motive for the omission. The defendant swore that his reason for the omission was because he thought the claim was paid; that in 1865 he had left property with one C. to sell, and pay it among other debts, and told plaintiff's brother, who then held the note, that he had done so, and that as late as 1868 he had seen him, and he never mentioned the subject, nor had he at any time been asked for the money. The brother, in answer, said he had asked for payment, but did not state the time: *Held*, leave having been reserved to move for a non-suit upon the whole case, that the rule should be absolute, for though upon the plaintiff's evidence the mere omission unexplained might afford some evidence of fraudulent intent, yet this was repelled by the undisputed facts sworn to by defendant (*Foster* vs. *Taylor*, 31 Q. B. U. C. 24).

An agent claimed to retain possession of property for his indemnification in respect of certain accommodation notes given to his principals, living in England before the bankruptcy there of the latter, on which, however, he had paid nothing, and he disputed any liability to the holders in respect thereof: *Held* that the Assignee in bankruptcy was entitled to a receiver (*Kemp* vs. *Jones*, 12 Grant, 260).

In such a case the defendant set up a defence founded upon a verbal agreement, proved by his own affidavit only, and inconsistent with a written instrument, which purported to contain the agreement entered into between the parties, such agreement having been drawn by defendant himself, a practising attorney and solicitor, and executed by all the parties. The verbal agreement was said to have been omitted from the writing through the confidence existing between the parties: *Held* that the defence ought not to prevail on a motion for a receiver (*ib.*).

A receiver granted with liberty to defend and to propose himself as such, without salary (*ib*).

See *Phillips* vs. *Masson*, 9 U. C. Q. B. 392; *Maulson* vs. *Commercial Bank*, 2 U. C. Q. B. 338; see also *City of Glasgow Bank* vs. *Murdoch et al*, 11 C. P. U. C. 138).

As to amendments in proceedings under this Act.

116. The rules of procedure as to amendments of pleadings, which may be in force at any place where any proceedings under this Act are being carried on, shall apply to all proceedings under this Act; and any court or judge, or Assignee, before whom any such proceedings are being carried on, shall have full power and authority to apply the appropriate rules as to amendments, to the proceedings so pending before him; and no pleading or proceeding shall be void by reason of any irregularity or default which can or may be amended under the rules and practice of the court.

This section is a re-enactment of the 133rd section of the Act of 1869.

As to amendment of pleadings and proceedings—see Harrison, C. L. P. Act pp. 153 and 315 and notes.

Provision in case of death of insolvent.

117. The death of the insolvent, pending proceedings in liquidation, shall not affect such proceedings, or impede the winding up of his estate; and his heirs or other legal representatives may continue the proceedings on his behalf to the procuring of a discharge, or of the confirmation thereof, or of both; and the provisions of this Act shall apply to the heirs, administrators or other legal representatives of any deceased person, who, if living, would be subject to its provisions, but only in their capacity as such heirs, administrators or representatives, without their being held to be liable for the debts of the deceased to any greater extent than they would have been if this Act had not been passed.

Representatives, how far liable.

This section is similar to the 134th section of the Act of 1869.

If a debtor against whom a petition for adjudication is presented dies before the order of adjudication is made, the petition cannot proceed

(*Ex parte Beale*, 2 V. & B. 29). But when a debtor who has been adjudged bankrupt dies, the court may order that the proceedings in the matter be continued as if he were alive (Eng. B. A. Act 1869, Sec. 80, par. 9).

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118. The costs of the proceedings in insolvency up to and inclusive of the notice of the appointment of the Assignee, shall be paid by privilege as a first charge upon the assets of the insolvent; the disbursements necessary for winding up the estate shall be the next charge on the property chargeable with any mortgage, hypothec or lien, and upon the unincumbered assets of the estate respectively, in such proportions as may be justified by the nature of such disbursements, and their relation to the property as being incumbered or not, as the case may be; and the remuneration of the Assignee and the costs of the judgment of confirmation of the discharge of the insolvent, except when such confirmation is upon a deed of composition, or of the discharge if obtained direct from the court, and the costs of the discharge of the Assignee being first taxed by the proper taxing officer at the tariff rate, or if there be no tariff, at the same rate as is usual for uncontested proceedings of a similar character, after notice to the inspectors, or to at least three creditors, shall also be paid therefrom as the last privileged charge thereon. But no portion of the assets or property chargeable with any mortgage, hypothec or lien for any claim not provable on the estate shall be liable for any other but their proportion of the costs necessarily incurred in realizing such assets and property, except what may remain after payment of such mortgage or lien.

Costs; on what property and in what order chargeable.

As to assets chargeable with mortgages, &c.

This section is somewhat similar to the 135th section of the Act of 1869. The latter portion of it as to assets chargeable with mortgages &c. is new, (see *Morgan Ins.* vs. *Whyte and Biron* cited under section 82 supra).

With regard to rent, the landlord may, in Quebec, claim for the amount payable to the end of current yearly term, after the assignment or the attachment, whether there be a lease or not, as by the common law of that Province, the owner of premises rented yearly without a lease can claim payment by privilege for the current year (Civil Code Act 2005). In Ontario, New Brunswick and Nova Scotia, the preferential lien of the landlord is restricted to one year last previous to the assignment or attachment, and from thence so long as the Assignee may retain possession of the premises leased (Popham, 86).

The deposit required to be made by foreign fire insurance companies is intended for the security of Canadian policy holders, and on the insolvency of any such company, the general creditors of the company are not entitled to share the deposit with the policy holders (*In re the Ætna Insurance Co. of Dublin*, 17 Grant, 160).

Provision as to letters addressed to insolvent by post.

119. The judge shall have the power, upon special cause being shown before him under oath for so doing, to order any postmaster at the place of residence or at the place of business of the insolvent to deliver letters addressed to him at such post-office to the Assignee, and to authorize the Assignee to open such letters in the presence of the prothonotary or clerk of the court of which such judge is a member, and in the presence of the insolvent or after notice given to him by letter through the post, if he be within the Province; and if such letters be upon the business of the estate, the Assignee shall retain them, giving communication of them, however, to the insolvent on request; and if they be not on the business of the estate they shall be resealed, endorsed as having been opened by the Assignee, and given to the insolvent or re-

turned to the post-office; and a memorandum in writing of the doings of the Assignee in respect of such letters shall be made and signed by him and by the prothonotary or clerk, and deposited in the court.

This section is similar to the 136th section of the Act of 1869.

The 124th section of the English Act of 1869 gave power to order that all post letters directed to the bankrupt be delivered by the postmaster to the Official Assignee:

Held that if a bankrupt absconds without surrendering, the court will order all his post letters addressed to his place of business to be intercepted and sent to the Official Assignee (*In re Lawrence*, 20 L. T. Rep. 16).

Disqualification of judge.

120. All causes of disqualification applying to a judge in civil matters in the several Provinces to which this Act applies, shall be causes of disqualification and recusation under this Act, as regards the final hearing and determination of any matter subject to appeal or revision under this Act; but such grounds of disqualification shall not apply to mere ministerial acts or incidental proceedings; and such causes of disqualification shall be tried as provided for by the laws in force in the several Provinces where the proceedings are pending. If a judge be disqualified or incompetent to act in any matter in insolvency under this section, the judge competent to act in matters of insolvency in a county or district adjoining that in which the proceedings are pending (or in the case of a judge of the Court of Probate in Nova Scotia, the judge of the said court in an adjoining county), and who is not disqualified under this section, shall be the judge who shall have jurisdiction in such matter, in the place of the judge so disqualified.

What judge to act in such case.

Prothonotary to preside (in Quebec) in absence of judge.

121. In the absence of the judge from the chief place of any district in the Province of Quebec, the prothonotary of the court shall preside at the meetings of creditors called to take place before the judge, and shall take minutes of the proceedings at the same, and shall in such cases, as well as in all others, make any order which the judge is empowered to make; but the same shall not be delivered nor put into execution if any objection to it is fyled with the prothonotary, the same day or the next after, and then the whole matter and all the papers and proceedings produced and had at such meeting shall be referred to the judge, who shall adjudicate upon the same, confirming the order made by the prothonotary, or making such other as he may think best in the case.

Rules of practice and tariff of fees in the Province of Quebec; how to be made.

122. In the Province of Quebec, rules of practice for regulating the due conduct of proceedings under this Act, before the court or judge, and tariffs of fees for the officers of the court and for the advocates and attorneys practising in relation to such proceedings, or for any service performed or work done for which costs are allowed by this Act (but the amount whereof is not hereby fixed), shall be made forthwith after the passing of this Act, and when necessary repealed or amended, and shall be promulgated under or by the same authority and in the same manner as the rules of practice and tariff of fees of the Superior Court, and shall apply in the same manner, and have the same effect in respect of proceedings under this Act as the rules of practice and tariff of fees of the Superior Court

apply to and affect proceedings before that Court and bills of costs upon proceedings under this Act may be taxed and proceeded upon in like manner as bills of costs may now be taxed and proceeded upon in the said Superior Court.

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123. In the Province of Ontario the judges of the superior courts of common law, and of the court of Chancery, or any five of them, of whom the Chief Justice of the Province of Ontario, or the Chancellor, or the Chief Justice of the Common Pleas, shall be one,—in the Province of New Brunswick, the judges of the Supreme Court of New Brunswick, or the majority of them,—in the Province of Nova Scotia, the judges of the Supreme Court of Nova Scotia, or the majority of them,—in the Province of British Columbia, the judges of the Supreme Court, or the majority of them,— in the Province of Prince Edward Island, the judges of the Supreme Court or a majority of them,—and, in the Province of Manitoba, the judges of the Court of Queen's Bench, or a majority of them,—shall forthwith make and frame and settle the forms, rules and regulations, to be followed and observed in the said Provinces respectively, in proceedings in insolvency under this Act, and shall fix and settle the costs, fees and charges which shall or may be had, taken or paid in all such cases by or to attorneys, solicitors, counsel and officers of courts, whether for the officer or for the Crown as a fee for the fee fund or otherwise, and by or to sheriffs, Assignees or other persons whom it may be necessary to provide for, or for any service performed or work done for which costs are allowed

And in the other Provinces.

by this Act, but the amount whereof is not hereby fixed.

Although the 139th section of the Act of 1869 was supposed to make it imperative for the judges to frame rules and to fix a tariff of costs under the Insolvent Act no rules whatever were framed under that Act.

Present rules, &c., to remain until altered.

124. Until such rules of practice and tariff of fees have been made, as required by the two preceding sections, the rules of practice and tariff of fees of insolvency, now in force in the said Provinces respectively, shall continue and remain in full force and effect.

Assignee to be subject to summary jurisdiction of court.

125. Every Assignee shall be subject to the summary jurisdiction of the court or judge in the same manner and to the same extent as the ordinary officers of the court are subject to its jurisdiction; and the performance of his duties may be compelled, and all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, hypothec, lien or right of property upon, in or to any effects or property in the hands, possession or custody of an Assignee, may be obtained by an order of the judge on summary petition in vacation, or of the court on a rule in term, and not by any suit, attachment, opposition, seizure or other proceeding of any kind whatever; and obedience by the Assignee to such order may be enforced by such court or judge under the penalty of imprisonment, as for contempt of court or disobedience thereto, or he may, if not an Official Assignee, be removed in the discretion of the court or judge.

Obedience how enforced.

This section is similar to the 50th section of the Act of 1869.

Declaration for entering a mill and taking and converting plaintiff's goods. Plea in substance, that the plaintiff's claim to the goods and mill is only under a mortgage made to one W, who, before the grievances complained of, made an assignment, under the Insolvent Act of 1869, to defendant of all his estate and effects, including this mill and goods, subject to plaintiff's mortgage; that W was then in possession of the premises, and such was transferred to the defendant, who took possession as such Assignee, and, except as Assignee, defendant has in no way interfered with the mill or goods; that the plaintiff's alleged right of property can be determined by the county judge, and that this court has no jurisdiction to try the same: *Held*, on demurrer, plea good, the plaintiff, under the facts stated, being restricted by section 50 of the Insolvent Act of 1869 to the remedy there given: *Held* also that that section was not beyond the power of the Dominion Parliament as being an interference with property and civil rights, but was within their exclusive authority over bankruptcy and insolvency (*Crombie* vs. *Jackson*, 34 Q. B. U. C. 575).

Where the goods of A, having been seized by the sheriff under an execution against B, had been handed over by the sheriff to an Assignee, to whom the debtor had made a voluntary assignment in insolvency: *Held* that A might maintain replevin against the Assignee: *Held* also that section 50 of the Insolvent Act of 1869 could not apply against the plaintiff, who was not a creditor, or in any way interested in the estate of the insolvent (*Burke* vs. *McWhirter*, 35 Q. B. U. C. 1).

Registration of marriage contracts of traders in Quebec.

126. In the Province of Quebec every trader having a marriage contract with his wife, by which he gives or promises to give or pay or cause to be paid, any right, thing, or sum of money, shall enregister the same, if it be not already enregistered, within three months from the execution thereof; and every person not a trader, but hereafter becoming a trader, and having such a contract of marriage with his wife, shall cause such contract to be enregistered as aforesaid (if it be not previously thereto enregistered,) within thirty days from becoming

such trader; and in default of such registration the wife shall not be permitted to avail herself of its provisions in any claim upon the estate of such insolvent for any advantage conferred upon or promised to her by its terms; nor shall she be deprived by reason of its provisions of any advantage or right upon the estate of her husband, to which, in the absence of any such contract, she would have been entitled by law; but this section shall be held to be only a continuance of the second sub-section of section twelve of the "*Insolvent Act of* 1864," and of section one hundred and forty of the "*Insolvent Act of* 1869," and shall not relieve any person from the consequence of any negligence in the observance of the provisions of the said sub-section or section.

This section is similar to the 140th section of the Act of 1869.

This section simply prohibits the wife from claiming on the estate of the husband under a marriage contract which has not been enregistered within the prescribed delay, it does not prevent her from holding property when she is separated as to property (*separee de biens*) from her husband by this contract, or by judgment of the court (Popham, 164).

IMPRISONMENT FOR DEBT.

Insolvent in gaol or on the limits may apply to judge for discharge.

127. Any debtor confined in gaol or on the limits in any civil suit, who may have made the assignment provided for in this Act, or against whom process for liquidation under this Act may have been issued may, at any time after the meeting of creditors provided for in this Act, make application to the judge of the county or district in which his domicile may be or in which the gaol may be in which he is confined, for his discharge from imprisonment or confinement in such suit; and thereupon such judge may grant an order in writing

Proceedings thereon.

directing the sheriff or gaoler to bring the debtor before him for examination at such time and place in such county or district as may be thought fit; and the said sheriff or gaoler shall duly obey such order, and shall not be liable to any action for escape in consequence thereof, or to any action for the escape of the said debtor from his custody, unless the same shall have happened through his default or negligence; or if the debtor is confined in the county or district in which the judge does not reside, the judge instead of ordering the debtor to be brought before him for examination may, if he sees fit, make an order authorizing and directing the Official Assignee for the county or district in which the debtor is confined, to take such examination, and it shall be the duty of the Official Assignee to take down or cause to be taken down such examination fully in writing and transmit the same under his hand forthwith to the judge; and the Official Assignee shall be entitled to ten cents for each folio of one hundred words of such examination.

Examination of insolvent and witnesses.

(1.) In pursuance of such order the said confined debtor and any witnesses subpœnaed to attend and give evidence at such examination may be examined on oath at the time and place specified in such order before such judge or Assignee; and if on such examination it appears to the satisfaction of the judge that the said debtor has *bona fide* made an assignment as required by this Act, and has not been guilty of any fraudulent disposal, concealment or retention of his estate or any part thereof, or of his books and accounts or any material portion thereof, or otherwise in any way contravened the provisions of this Act, such judge shall, by his order

Judge may discharge him if the examination be satisfactory.

in writing, discharge the debtor from confinement or imprisonment; and on production of the order to the sheriff or gaoler, the debtor shall be forthwith discharged without payment of any gaol fees: Provided always, that no such order shall be made in any case unless it be made to appear to the satisfaction of such judge that at least seven days' notice of the time and place of the said examination had been previously given to the plaintiff in the suit in which the debtor was imprisoned, or to his attorney and to the Assignee for the time being:

Proviso.

Minutes of examination to be kept.

(2.) The minutes of the examination herein mentioned shall be filed in the office of the clerk of the court out of which the process issues, and a copy thereof shall be delivered to the Assignee; and if, during the examination or before any order be made the Official Assignee or the appointed Assignee, or the creditor or any one of the creditors at whose suit or suits the debtor is in custody makes affidavit that he has reason to believe that the debtor has not made a full disclosure in the matters under examination, the judge may grant a postponement of such examination for a period of not less than seven days, nor more than fourteen days, unless the parties consent to an earlier day:

Postponement in certain cases.

As to any subsequent arrest.

(3.) After such examination, in case of any subsequent arrest in any civil suit as aforesaid for causes of action arising previous to the assignment or process for liquidation, the said debtor may, pending further proceedings against him under this Act, be forthwith discharged from confinement or imprisonment in such suit, on application to any judge and on producing such previous discharge: Provided that nothing in this section contained, shall inter-

Proviso.

fere with the imprisonment of the said debtor, in pursuance of any of the provisions of this Act.

This section is somewhat similar to the 145th section of the Act of 1869.

That part of above section which empowers the judge to order the Assignee to take down or cause to take down the examination in writing, and transmit the same to the judge is new.

APPEAL.

Appeal from any order of the judge in Province of Quebec.

128. In the Province of Quebec all decisions by a judge in chambers in matters of insolvency shall be considered as judgments of the superior court, and any final order or judgment rendered by such judge or court may be inscribed for revision or may be appealed from by the parties aggrieved in the same cases and in the same manner as they might inscribe for revision or appeal from a final judgment of the superior court in ordinary cases, under the laws in force when such decision shall be rendered.

In other Provinces.

If any of the parties to any contestation, matter or thing upon which a judge has made any final order or judgment are dissatisfied with such order or judgment, they may, in the Province of Ontario, appeal therefrom to either of the superior courts of common law or to the Court of Chancery, or to any one of the judges of the said courts in the Province of New Brunswick to the Supreme Court of New Brunswick, or to any one of the judges of the said court; in the Province of Nova Scotia to the Supreme Court of Nova Scotia or to any of the judges of the said court; in the Province of British Columbia to the Supreme Court of that Province, or to any judge of the said court; in the Province of Prince Edward Island to

the Supreme Court of Judicature, or to any judge of the said court; in the Province of Manitoba, to the Court of Queen's Bench, or to any judge of the said court; but any appeal to a single judge in the Provinces of Ontario, New Brunswick, Nova Scotia, British Columbia, Prince Edward Island, or Manitoba, may, in his discretion, be referred, on a special case to be settled, to the full court, and on such terms in the mean time as he may think necessary and just. No such appeal or proceeding in revision shall be entertained unless the apellant or party inscribing for revision shall have, within eight days from the rendering of such final order or judgment, adopted proceedings on the said appeal or revision, or unless he shall, within the said delay, have made a deposit or given sufficient sureties before a judge that he will duly prosecute the said appeal or proceedings in revision, and pay such damages and costs as may be awarded to the respondent. If the party apellant does not proceed with his appeal, or in review, as the case may be, according to the law or the rules of practice, the court, on application of the respondent, may order the record to be returned to the officer entitled to the custody thereof, and condemn the appellant to pay the respondent the costs by him incurred.

Appeal to be prosecuted within eight days.

If appellant does not proceed.

A demand for wages was made as a preferred claim, to an Assignee. The creditors at a meeting passed a resolution authorizing the Assignee to pay all claims for wages, but the Assignee refused payment of this claim as made. At this time no dividend sheet had been prepared. A summons was subsequently issued by the county judge, calling on the Assignee to show cause why he should not pay the claim, and, the Assignee not appearing, evidence was taken before the judge, and an order made for the payment forthwith, with costs, of a sum less than the original demand. The Assignee afterwards paid the claim as reduced.

but refused to pay any costs ; upon which the judge's order was made a rule of court, and execution issued thereupon against the goods of the Assignee. Upon his application for a writ of prohibition to prohibit further proceedings in the county court on the writs or orders, &c. : *Held*, 1, that the county judge had no power to adjudicate upon the claim until it had been decided upon by the Assignee, and in this case there was no decision of the Assignee to appeal from (*In re Cleghorn and the Judge of the County of Elgin, and Munn*, 2 L. J. [N. S.] 133.—C. L. Chamb.—Richards.)

The Insolvent Acts of 1864 and 1865 do not require the petition in appeal to be signed by the insolvent or his attorney. Notice must be served on the Assignee of the day for presenting the petition to the court. The petition must be addressed to the court, not to the Chief Justice ; but this irregularity may probably be corrected. The neglect by the Assignee to file the papers on or before the day of presenting the petition is no reason for rejecting the appeal, though it may be for enlarging the hearing, and proceeding against the Assignee for his neglect or contempt. Points not taken in the court below are not open to parties in appeal. Semble, that the more proper mode of raising such technical objections is to move a rule to set the proceedings aside, instead of urging the objections on the argument of the merits (*In re Parr*, 17 C. P. 621).

On an application to a judge in chambers for the allowance of an appeal from the decision of the judge in insolvency, an order was made referring the matter to this court, without directing a special case to be settled between the parties, but no objection was made on this ground :—*Held*, that this was only an irregularity which might be waived, and, if not waived, ought to have been objected to by a rule to set aside the proceedings on that ground, in accordance with *In re Parr*, 17 C. P. 621 ; and that as the petition of appeal had been filed by permission of the court, and the appellant authorized to serve notice of hearing of appeal for a day named, the case was properly before the court for adjudication (*In re Sharpe*, 20 C. P. 82).

An insolvent had been refused an absolute discharge by a county judge, from whose decision he appealed. The judge gave his reasons in writing, and concluded, "I must refuse his discharge absolutely, and must deny the prayer," &c. :—*Held* an *order* which could be appealed from, no formal order having been drawn up and signed (*In re Jones*, 4 P. R. 317.—C. L. Chamb.—A. Wilson).

Notice of application for allowance of an appeal must be served within eight days from the day on which the judgment appealed from is pro-

nounced, but the application itself may be after the eight days (*Re Owens*, 12 Chy, 446).

Where the notice was served in time, but named a day for the application which did not give the time the insolvent was entitled to, and was irregular in some other respects, the notice was held amendable (*Ib*).

Objections to the security on an appeal from the county court judge, under the Insolvent Act, 1864, are to be made to such judge (*S. C. Ib.* 560.)

An application for a discharge was dismissed by the county judge on 17th September. On the 23rd the insolvent gave notice of an intended application on the 24th to a judge at Osgoode Hall, for leave to appeal: *Held*, that this notice was clearly insufficient, but on the authority of *Re Owens*, 12 Chy. 446 (which was, however, doubted), and in favour of the liberty of a subject, the notice was amended. Quære, as to the materials that should be before the judge on such an application (*In re Davidson*, 4 P. R. 153.—C. L. Chamb.—A. Wilson.)

E., living at Brantford, and James and John G., living in Dundas, carried on business at Brantford under the name of E. & Co.; and James and John G. had also a separate business at Dundas, in which E. had no interest. On the 14th December, 1869, James and John G., as individuals, and as partners in the firm of James and John G., and as individual members of the firm of E. & Co., executed an assignment under the Insolvent Act of 1869, in Wentworth, of their and each of their estates to one F., an Official Assignee in that county. On the following day E. made an assignment of his estate, under the Act to an interim Assignee in the County of Brant, and F. was afterwards appointed Assignee by the creditors. K. & Co., creditors of E. & Co. filed a claim in Brant under E.'s assignment, which other creditors objected to, and the Assignee, having heard the parties, made his award:—*Held*, that the county judge of Brant had jurisdiction to hear an appeal against such award, although James and John G., the co-partners of E., had not joined in his assignment; and a mandamus was ordered directing him to hear and determine such appeal (*In re McKenzie et al.*, 31 Q. B. 1).

When an insolvent, who has appealed from the decision of a county judge refusing to set aside an attachment against him, dies during the pendency of this appeal, and no personal representative has been appointed, the appeal fails (*Lawrie* v. *McMahon*, 6 P. R. 9.—C. L. Chamb.—Galt).

The county judge has a general jurisdiction in matters of insolvency, and may sanction a suit in the name of the Assignee for the benefit of the

estate, notwithstanding a majority, both in number and value, of the creditors pass a resolution forbidding further proceedings (*In re Lambe*, 13 Chy. 391).

The Assignee appealed from such an order in the interest of the creditors, whose transactions the suit impeached for fraud, and the appeal was dismissed with costs ; the court observing that it was not his duty to appeal from such an order at the expense of the estate (*Ib.*).

Where the affidavits on which an allowance of an appeal from a county court judge was sought were not intituled in any court, they were not allowed to be read (*In re Sharpe*, 2 Chy. Chamb. 67.—VanKoughnet).

An objection that no written order of discharge (against which it was sought to appeal) was produced, was considered fatal (*Ib.*).

Where the appellant was described as Wm. Darling, and the opposing creditors appeared to be Wm. Darling & Co., it was considered ground for refusing to entertain the appeal (*Ib.*).

An appellant in insolvency must apply promptly (*Ib.*).

The decision of a county court judge on an application by an insolvent for his discharge from imprisonment is appealable (*Hoods* vs. *Dodds*, 19 Chy. 639).

A petition of appeal from the decision of a county court judge acting in insolvency need not set out all the evidence, documents and materials used before the judge. What is needed is that either the petition or the notice accompanying it should shew to the opposite party the objection which is taken to the proceedings appealed from, and the materials to be used on the argument of the appeal (*Ib.*).

An order in insolvency was made on the 24th December ; the fifth day thereafter fell on Sunday : *Held*, that service of notice of appeal on Monday following was in time (*Ib.*).

It is not necessary that the security to be given on appeal in insolvency should be executed in presence of a judge (*Ib.*) (and see *In re Botsford*, 22 C. P. U. C. 65 ; and *in re Chaffey*, 30 Q. B. U. C. 64).

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129. Pending the contestation of any claim or of a dividend sheet and of any appeal or proceeding in revision, the Assignee shall reserve a dividend equal to the amount of the dividends claimed or contested. Reservation of amount of dividend contested.

The 82nd section of the Act of 1869 contains a similar provision to the above.

FRAUDS AND FRAUDULENT PREFERENCES.

Gratuitous contracts, within three months of insolvency presumed fraudulent.

130. All gratuitous contracts or conveyances, or contracts without consideration, or with a merely nominal consideration, respecting either real or personal estate, made by a debtor afterwards becoming an insolvent with or to any person whomsoever, whether such person be his creditor or not, within three months next preceding the date of a demand of an assignment or for the issue of a writ of attachment under this Act whenever such demand shall have been followed by an assignment or by the issue of such writ of attachment, or at any time afterwards, and all contracts by which creditors are injured, obstructed or delayed, made by a debtor unable to meet his engagements, and afterwards becoming an insolvent, with a person knowing such inability or having probable cause for believing such inability to exist, or after such inability is public and notorious, whether such person be his creditor or not, are presumed to be made with intent to defraud his creditors.

This section is similar to the 86th section of the Act of 1869.

The words "or at any time afterwards" are new.

M. had in his warehouse 2,500 bushels of rye belonging to T. & W. They owed him $1,400, made up of money due for storing that and other grain, for grain supplied to them, and for balance of account. T. & W. were insolvent, and their creditors pressing them, of which M. was aware. They demanded the grain more than once, alleging that it would enable them to meet their creditors' immediate demands, but M. refused, saying it was his only security, and in the end, T. offered if M. would give it up, and a receipt of the debt due to him by T. & W., to assign to M. his interest in a vessel then worth about $1,600.00, this M. assented to, and on the 20th of November, T. executed a bill of sale of his interest to M., and received the grain. This transfer, however, being informal was returned by the Custom House authorities and another one executed on the

5th December. On the 7th January, an attachment in insolvency issued against T.: *Held*, that as M. had demanded payment, and the transfer was made on the express condition that the rye should be given up, the transaction must be regarded as not a voluntary one, and therefore not one by which M. had obtained an unjust preference : *Held*, also that the transaction must be looked at as if carried out on the 28th November (*McFarlane* vs. *McDonald*, 21 Grant, 319).

A debtor, being in difficulties, assigned all his property to a creditor, who agreed to pay a composition of 40 cents in the $ within a year. This had been paid, except to defendant, who refused to accept, and issued execution. On an interpleader between the Assignee and the defendant, to try the title to the goods assigned, the jury having found the transaction *bona fide* : *Held*, affirming the judgment of the county court, that such assignment was not avoided by the Insolvent Act, sec. 8, for that the statute applies only where proceedings are taken, and as against a person claiming, under it : *Held*, also, that the assignment was not invalid under C. S. U. C. c. 26, s. 18 (*Squire* v. *Watt*, 29 Q. B. U. C. 328).

A bank having cashed a bill of exchange, and taken by way of collateral security a bill of sale of certain goods of the drawer, this transaction was held not invalidated by the drawer's insolvent circumstances at the time (*Newton* vs. *The Ontario Bank*, 15 Grant, 283). In appeal from S. C. 13 Grant, 652.

On the 18th of October the insolvents sold goods to one C., taking his note for the price, which on the same day was taken by C., and by the defendant, and one of the insolvents, to a bank, and there left to be applied in payment of notes made by the insolvents and endorsed by defendant. On the 20th the insolvents made a voluntary assignment, being pressed to do so by threats of compulsory liquidation : *Held*, that the transaction being within thirty days before the assignment was a transfer to defendant by way of payment, giving him an unjust preference, and therefore void under sec. 8, sub-s. 1 ; that there was evidence also that it was made by the insolvents when unable to pay, with a person knowing such inability, and therefore made with intent to defraud their creditors ; and that it was also a payment to defendant under sub-s. 5 : *Held*, also, Morrison, J., dubitante, that under sub-ss. 4 and 5 the Assignee might recover in trover for the goods sold, though before his title accrued the note had been discounted and the proceeds applied on defendant's endorsations(*Churcher* vs. *Cousins*, 28 Q. B. U. C. 540).

In Quebec the right has existed to annul a sale of real estate, if the price given were less than half its value (Code Napoleon 1313), but it has

been recently limited to minors, and majors can no longer annul a contract for cause of lesion only (Civ. Code, L. C., Art. 1012).

It is held that the pressure or importunity from a creditor will prevent the act from being a fraudulent preference. The cases establish that if there was a *bona fide* application or pressure on the part of some person having a right to apply, and the Act in any degree proceeded from such application or pressure, it was not entirely voluntary, and therefore was not a fraudulent preference (*Brown* vs. *Kempton*, 19 L. J. C. P. 169; *Edward* vs. *Glyn*, 2 El. & El. 5; *Morgan* vs. *Brunnell*, 5 B. & Ad. 296; *Bills* vs. *Smith*, 6 B. & S. 314).

It was held that in order to prevent a transaction from being a fraudulent preference there must be an absence of collusion. If, therefore, the creditor acted in consequence of a hint or suggestion from the debtor as to the state of his affairs, a demand or pressure by the creditor would not prevent the act from being a fraudulent preference (*Strachan* vs. *Barton*, 11 Ex. 647; *Singleton* vs. *Buttler*, 2 B. & P. 283).

But if the creditor procured his information as to the state of the debtor's affairs from a third person, to whom the debtor had in confidence communicated it, this was held not to make payment to such creditor on demand or pressure a fraudulent preference (*Belcher* vs. *Jones*, 2 M. & W. 258; *Badsly* vs. *Ballard*, 1 Comp. 416).

It was not necessary in order to protect the transaction from being a fraudulent preference that the debt should be actually payable (*Thompson* vs. *Freeman*, 1 T. R. 155; *Strachan* vs. *Barton*, supra). But the person demanding payment or security was required to be some one having a right to do so (*Strachan* vs. *Barton*, supra; *Belcher* vs. *Prettie*, 10 Bing. 408). A request by a surety was held to be sufficient (*Edwards* vs. *Glynn*, 2 El. & El. 29). And see notes to sections 132 and 133.

Certain other contracts voidable.

131. A contract or conveyance for consideration respecting either real or personal estate, by which creditors are injured or obstructed, made by a debtor unable to meet his engagements with a person ignorant of such inability, whether such person be his creditor or not, and before such inability has become public and notorious, but within thirty days next before a demand of an assignment or the

issue of a writ of attachment under this Act, or at any time afterwards, whenever such demand shall have been followed by an assignment or by the issue of such writ of attachment, is voidable, and may be set aside by any court of competent jurisdiction, upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the court may order.

This section is similar to the 87th section of the Act of 1869.

On the 13th September, 1866, S. agreed to deliver on account of K. at a railway station when wanted, 600 boxes of factory cheese at a certain rate per pound, and to keep the same insured until wanted. The weight had not been ascertained, in fact all had not been manufactured. Subsequently two warehouse receipts dated respectively 21st September and 9th October were given to K, one for 330 the other for 230 boxes, signed by S. and specifying the weight of the cheese. On the 22nd October K. mortgaged to plaintiff 400 boxes of cheese purchased by him from S. on or about the 13th September, and then in the curing house of S. to secure moneys advanced to him by plaintiff upon the security of part of the cheese. This mortgage was not filed. S. became insolvent on the 19th October following, and K. became aware of it on the following day. The plaintiff replevied 341 boxes of cheese : *Held*, that if even the property did not pass before the 21st September, the subsequent insolvency of S. did not affect K's right, for that the Insolvent Act of 1864, sect. 8 subsect. 2, did not apply, as there was no evidence of obstructing or injuring creditors but the contrary, the property having been sold at its full value, but even if the case were within that clause the contract would be voidable only under the order of a competent tribunal, upon such terms as to the protection of the person from actual loss or liability as the court might direct : *Held*, also, that the mortgage to the plaintiff was valid, having been taken by way of additional security for a debt contracted to the bank in the course of its business, and therefore within C. S. C., c. 54, s. 4, that it could not be impeached by anyone for want of filing, but an opposing creditor of K., and that as S. could not impeach it, neither could the defendant his Assignee in insolvency (*Bank of Montreal* vs *McWhirter*, 17 C. P. 506).

Contracts made with intent to defraud creditors to be void.

132. All contracts, or conveyances made and acts done by a debtor, respecting either real or personal estate, with intent fraudulently to impede, obstruct or delay his creditors in their remedies against him, or with intent to defraud his creditors, or any of them, and so made, done and intended with the knowledge of the person contracting or acting with the debtor, whether such person be his creditor or not, and which have the effect of impeding, obstructing, or delaying the creditors of their remedies, or of injuring them or any of them, are prohibited and are null and void, notwithstanding that such contracts, conveyances, or acts be in consideration, or in contemplation of marriage.

This section is similar to the 88th section of the Act of 1869.

A banking firm in Toronto, having become embarrassed by gold operations in New York, applied to the plaintiffs, to whom they owed $50,000, to advance them $15,000 more ; and, in order to obtain the advance, they offered to secure both debts by a mortgage on the real estate of one of the partners, worth $30,000. The plaintiffs agreed, made the advance, and obtained the mortgage. In less than three months afterwards the debtors became insolvent under the Act. They were indebted beyond their means of paying at the time of executing the mortgage, but they did not consider themselves so, nor were the mortgagees aware of it. The mortgage was not given from a desire to prefer the mortgagees over other creditors, but solely as a means of obtaining the advance which they thought would enable them to go on with their business and pay all their creditors :—*Held*, that as respects the antecedent debt the mortgage was valid as against the Assignee in insolvency (*Royal Canadian Bank* vs. *Kerr*, 17 Grant, 47).

In 1869 C. lent money to N. on an express agreement that it was to be secured by mortgage on certain property ; and on the 3rd July following the mortgage was given accordingly ; and on the 2nd August the mortgagor became insolvent :—*Held*, that the mortgage was valid (*Allan* vs. *Clarkson*, 17 Grant, 570).

A person in embarrassed circumstances applied to one of his creditors to supply him with goods to enable him to carry on his business, which the

creditor agreed to supply on obtaining security therefor, as also for his pre-existing debt ; and a chattel mortgage for this purpose was accordingly given, and the goods supplied':—*Held*, not such a preference as rendered the chattel mortgage void (*Risk* vs. *Sleeman*, 21 Grant, 250).

Two partners, before the Insolvency Act, assigned their joint and separate estates together, for the benefit of their joint and separate creditors, pari passu. An Assignee under the Act, afterwards appointed, filed a bill to set aside these assignments, on the ground that, to put the separate creditors of each on an equality with the joint creditors in respect of the joint property, and of the separate property of the other partner, was a fraud on the joint creditors. But it appearing that both the separate estates were solvent, and that the equality complained of was an advantage to the joint creditors, the bill was dismissed with costs (*McDonald* vs. *McCallum*, 11 Grant, 469).

The insolvent had conveyed by way of settlement to his intended wife a lot on which he had commenced a house, but which was not completed until after the marriage. On a b ill filed by the Assignee in insolvency, the court declared that for so much of the building as was completed after marriage, the creditors had a claim on the property, but gave the wife the right to elect whether she would be paid the value of her interest without the expenditure after marriage, or pay the Assignee the amount of such expenditure, and it subsequently appearing that the husband had created a mortgage prior to the settlement, the wife was declared entitled to have the value of the improvements made after marriage, applied in discharge of the mortgage in priority to the claims of creditors (*Jackson* vs. *Bowman*, 14 Grant, 156).

It has been held that in order to bring a deed within the statute, 13 Eliz, Cap. 5, the fraudulent intent need not be actually proved to exist ; it is sufficient if the circumstances are such as to warrant the inference of fraud, want of consideration accompanied by embarrassed circumstances has generally been considered to be sufficient to bring a deed within that statute. The principles deducible from the cases appear to be that, if having regard to the debts owing by the settlor or grantor at the date of the deed, and the proportion of his property comprised in it, his creditors are defeated or delayed ; if, in fact, the property omitted from the settlement, and immediately available for the payment of his debts is not sufficient for that purpose, the deed will be fraudulent and void within the statute (*French* vs. *French*, 6 D. M. & G. 95 ; *Holmes* vs. *Penny*, 3 R. & J. 90 ; *Crossby* vs. *Elworthy*, L. R. 12 Eq. 158).

A deed, *bona fide*, executed for the benefit of one or more creditors,

and not meant as a cloak for retaining a benefit to the debtor will not be void under 13 Eliz. Cap. 5, although it may operate to the prejudice of some particular creditor, and would, if the debtor were bankrupt, be void under the policy of the bankrupt law (*Alton* vs. *Harrison*, L. R. 4, Ch. Ap. 623 ; *Bayfus* vs. *Bullock*, L. R. 7, Eq. 391 ; *Young* vs. *Barnett*, 1 F. & F. 320 ; *Darvell* vs. *Terry*, 6 H. & N. 807).

If the person with whom the debtor contracts be ignorant of his financial condition the contract or conveyance will be valid, if made upon a consideration, or if the insolvency be not notorious (*Bedarride du Nol*, No. 1432 ; Jousse, Ord. 1673, tit. 11, art. 4 and paragraph, 86).

In Ontario, it is held that actual knowledge, not mère constructive notice, is necessary to vitiate under this clause (*Leys & Wife* vs. *McPherson*, 17 C. P. U. C. 266).

This section is copied from sub-section 3 of section 8 of the Act of 1864. Under that the case of *Davis et al* vs. *Muir and Chamberlin* contesting has been recently decided in the Superior Court, at Montreal. It is of sufficient interest to be reproduced somewhat fully.

About the month of June, 1867, the insolvents, Davis, Welsh & Co obtained from James Muir, his accommodation notes in their favour for $12,000.00.

About the 10th January, 1868, James Muir hearing that they had suspended payment, obtained their notes, and caused them to be antedated and made correspond as regards the dates and amounts to the accommodation notes. Davis, Welsh & Co. made an assignment under the Act about ten days after.

One of these notes was then transferred by him, but without recourse to the claimant E. Muir, a creditor of James Muir, who took it as a security for an antecedent debt, but before its apparent maturity and without any positive knowledge of the foregoing details.

Shortly after this transfer by James Muir to E. Muir, the former also became insolvent. Under these circumstances, E. Muir, as the holder of the note being as stated one of those got by James Muir from the D., W. & Co. in January, 1868, and holding it as collateral security without recourse (*sans recours*) did not rank on James Muir's estate, but claimed on the estate of the insolvents as the makers. Their right thus to rank was contested on the ground chiefly: 1st, that the note was given in violation of this section of the Act of 1864, and was therefore absolutely void, *ab initio*, even if E. Muir were a *bonæ fide* holder for value before maturity ; and 2ndly, on the ground that E. Muir having taken it for an antecedent

debt without incurring any new obligation on the strength of it, was not in fact a holder for value as against D., W. & Co.'s creditors.

The Assignee to the estate sustained the contestation on both these grounds, and on appeal to the Superior Court, Torrance, J., confirmed the judgment, resting his decision on the first ground as alone sufficient without adverting to any other. He held it was an attempt to create a security upon the estate of persons at the time insolvent, and that the prohibition pronounced was an absolute prohibition, which rendered null the note in no matter whose hands it was.

It is thus decided that a promissory note given in violation of this section of the Act is absolutely null, *ab initio*, even in the hands of a third party, an innocent holder, before maturity (see 13 L. C., Jur. 184).

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133. If any sale, deposit, pledge or transfer be made of any property real or personal by any person in contemplation of insolvency, by way of security for payment to any creditor; or if any property real or personal, movable or immovable, goods, effects, or valuable security be given by way of payment by such person, to any creditor whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, deposit, pledge, transfer or payment shall be null and void, and the subject thereof may be recovered back for the benefit of the estate by the Assignee, in any court of competent jurisdiction; and if the same be made within thirty days next before a demand of an assignment, or for the issue of a writ of attachment under this Act, or at any time afterwards, whenever such demand shall have been followed by an assignment or by the issue of such writ of attachment, it shall be presumed to have been so made in contemplation of insolvency.

Fraudulent preferential sales, &c., to be void.

Presumption of fraud.

This section is similar to the 89th section of the Act of 1869, and to sub-sect. 4 of sect. 8 of the Insolvent Act of 1864.

In this case the insolvent, about two months before the attachment against him, and his assignment consequent thereon, assigned to defendant, a creditor, a policy of insurance upon merchandise in security for a debt about to be placed in suit, and the insurance company, upon a fire, paid over the proceeds of the policy to the creditor to the extent of his debt. The plaintiff claimed as Assignee to recover back this amount and he called the insolvent, who swore that when he assigned the policy he had no contemplation of insolvency, that his intention was with the remaining assets and the residue of the moneys from the policy, after paying defendant, to re-open his business, but that he was driven into insolvency by the act of a creditor, who, though he had promised him time, sued out a writ of attachment against him : *Held*, that the onus being upon the plaintiff of proving that the transfer of the policy was made by the debtor in contemplation of insolvency (it not having been made within thirty days of the issue of attachment or of the execution of the deed of assignment) the evidence produced by him failed to establish this fact, and that the verdict, therefore, for the defendant was right : *Held*, also, that there was no fraudulent preference, it not being pretended that the assignment of the policy was the spontaneous act of the debtor, but the fair inference being that it was made in consequence of pressure by the creditor : *Held*, also, that sub-section five of section eight, clearly did not apply to this case, the money received by defendant not having been a payment by a debtor unable to meet his engagements in full, but having been received under the assignment of the policy and from the company ; that the assignment being valid, it was quite immaterial whether when the money was paid the defendant knew, or had probably cause for believing, the then inability of the insolvent to pay his debts in full (*McWhirter* vs. *Thorne*, 19 C. P. U. C. 302).

Under section 89 of the Insolvent Act of 1869, the presumption that transactions within thirty days next before the assignment, &c., were made in contemplation of insolvency, is not conclusive, but may be rebutted. In this case, the creditor, who lived twenty miles from the insolvent, had a mortgage on the insolvent's house for $900, of which $400 was due. On the 8th February, he wrote to the insolvent to call and arrange matters the next time he was in, and, on the 9th, he purchased from the insolvent about $1,400 worth of pork, on condition that $600 should go upon the mortgage, and he paid the balance of the purchase-money to other creditors. An attachment in insolvency issued on the 3d March, and the Assignee brought this suit against the creditor, to avoid the transaction. The creditor said he did not wish to press the debtor in any way, but wanted

his money. The debtor owed about $3,000, and his property produced only $1,000. There was contradictory evidence as to defendant knowing, or having probable cause for believing, that the debtor was unable to meet his engagements, and as to whether the property mortgaged was worth more than the balance left due upon it. The jury having found in favour of the defendant, the creditor, the court held that the transaction was not avoided by force of the statute, and, upon the facts, they refused to interfere : *Held* also, that the insolvent could not, under the circumstances, be said to have acted voluntarily within the meaning attached to that word by the decided cases (*Campbell* vs. *Barrie*, 31 Q. B. U. C. 279).

The insolvent, an innkeeper, on the 12th of August, 1869, gave the plaintiff a mortgage upon the whole of his property, payable in six months, for an over due debt. The attachment in insolvency issued on the 6th December following, and the Assignee seized and sold the goods. The evidence showed that the mortgagor knew, or had strong reason to believe himself to be insolvent when he gave the mortgage, but that the defendant did not know it, and that the mortgage was given under pressure by defendant, and not with intent to defeat or delay creditors : *Held* that, under these circumstances, it was not void, under the Insolvent Act, as against the Assignee (*Archibald* vs. *Haldan*, 31, Q. B. 295).

An insolvent absconded to the United States, taking money with him, he was followed there by the agent of a person in this country, who had become surety for him, and, by threats of criminal proceedings, induced to pay the amount of the security. A bill by the Official Assignee to recover the money from the surety, was dismissed with costs (*Roe* vs. *Smith*, 15 Grant 344).

The Insolvent Act of 1864 forbids mortgages of real estate to a creditor by way of preference (*Curtis* vs. *Dale*, 2 Chy. Chamb. 184).

But where the mortgagor did not believe he was insolvent (though the mortgagee feared he was so,) and made a mortgagee of real estate, under pressure of the mortgagee, and in the belief that he (the mortgagor) would thereby be enabled to continue his business and pay his liabilities in full, the mortgage was held valid as against his Assignee in insolvency (*Ibid*).

A preference which a debtor is induced to give by threats of criminal or other proceedings, is not void under the Indigent Debtors' Act of 1859, or the Insolvent Act of 1864 (*Clemmow* vs. *Converse*, 16 Grant 547. See also *McPherson* vs. *Reynolds*, 6 C. P. U. C. 491).

But to sustain the preference the pressure must have been real, and not a feigned contrivance between the debtor and creditor, to wear the

appearance of pressure for the mere purpose of giving effect to the debtor's desire and intention to give a preference (*Clemmow* vs. *Converse*, 16 Grant 547).

A mortgage was obtained, by pressure, from an insolvent person, a miller, three months before he executed an assignment in insolvency, the mortgage was for an antecedent debt, and was not enforcible for two years, it comprised the mortgagor's mill only, and left untouched about one-third of his assets; it was not executed with intent to give the mortgagee a preference, and, at the time of obtaining it, they were not aware of the mortgagor's insolvency. In a suit, by the Assignee in insolvency, impeaching the transaction, the mortgage was held to be valid (*McWhirter* vs. *Royal Canadian Bank*, 17 Grant 480).

The mortgagees, shortly after obtaining this mortgage, became aware of their debtor's desperate circumstances, and obtained from him, by pressure, a mortgage on his chattels used in his business. This mortgage was held void against the Assignee in insolvency *(Ibid)*.

Declaration in detinue and trover, for goods : Plea, that one J., the owner, being unable to meet his engagements, and in contemplation of insolvency, mortgaged the goods to the plaintiff, and within thirty days thereafter made a voluntary assignment in insolvency to the defendant, the Official Assignee ; that the mortgage was made to the plaintiff, as creditor of and surety for J., whereby the plaintiff obtained an unjust preference over J.'s other creditors, who were thereby injured and obstructed, wherefore the mortgage was void, and defendant, as Assignee, took the goods. The plaintiff replied that J. being a retail dealer and wanting goods to carry on his business, asked the plaintiff to endorse notes to enable him to purchase them ; that the plaintiff consented on the condition that J., on receiving the goods, should secure him against loss, by a mortgage thereon, and on the other goods in J.'s store, who was to sell them at his store only, and out of the proceeds retire the notes, and if he should sell otherwise, the plaintiff might sell the goods for his own protection; that the plaintiff accordingly endorsed, and J., with the notes, purchased goods, which he mortgaged to the plaintiff, as agreed on, with other goods, for the *bona fide* and sole consideration of perfecting the said agreement ; that J. afterwards, without the plaintiff's consent, assigned to the defendant, who took, with notice of the mortgage, and was proceeding to sell the goods, when the plaintiff forbade him and demanded them : *Held* that the replication was good, for that the plaintiff only became a creditor by the actual transaction in which he gave equivalent in the new goods purchased, procured on his credit ; and, under these circumstances,

the plaintiff being ignorant of J.'s position, the mortgage was not avoided by the Insolvent Act (see sec. 8, sub. sec. 1, 3, 4), though its effects might be to delay creditors. Quære, whether it was voidable under sub-sec. 2 (*Mathers* vs. *Lynch*, 27 Q. B. U. C. 244).

Held that the mortgage in this case, given under circumstances fully set out in 27 Q. B. 244, was good as against creditors, the jury having found it to be *bona fide;* and that notice to the Official Assignee of the mortgagee's claim was immaterial (S. C. 28 Q. B. U. C. 354).

Knox being indebted to one Kyle, and Kyle to defendant, it was arranged that defendant should take Knox as his debtor, defendant crediting Kyle with the amount which Knox owed to Kyle, and Kyle discharging Knox, and Knox accordingly gave defendant his note for the amount. This took place within thirty days before Kyle made an assignment in Insolvency, and his Assignee brought trover for the note, contending that the transaction was avoided by sec. 8, sub-sec. 4, of the Insolvent Act of 1864, but *Held*, that he could not recover, for the note never was the insolvent's property, and so never passed to the Assignee, and even if it was a transfer or payment by Kyle within the Act and so avoided, this would not entitle the plaintiff to the note (*McGregor* vs. *Hume*, 28 Q. B. U. C. 380).

To avoid a transaction under sub-sec. 4 of sec. 8 of the Insolvent Act of 1864, not only must there be a contemplation of insolvency, but coupled with it a fraudulent preference of the creditor to whom the transfer is made over the other creditors (*McWhirter* vs. *Thorne*, 19 C. P. U. C. 302).

A, a private banker, exchanged checks with B for mutual accommodation. A used B's check. A check of A's had been dishonoured, and the holder called at A's office the same day, and a clerk in the ordinary course of business gave B's check to the holder to pay A's dishonoured check. The next day A stopped payment : *Held*, following McWhirter *vs.* Thorne, 19 C. P. 302, that the transfer was not a fraudulent preference under the Insolvent Act of 1869 (*City Bank* vs. *Smith*, 20 C. P. U. C. 93).

The plaintiff claiming under a chattel mortgage for $2,000, as against an execution creditor, called the mortgagor, who swore that when it was given he was not insolvent, having real estate and a claim against a Railway Co. for which he had two years previously refused $100,000, but that there were several unsatisfied judgments and executions against him. He stated also that the mortgage was given for the price of the property covered by it, household furniture, which he had bought from the plaintiff, and that the terms of the purchase were cash, but being disappointed in getting the money to pay, he had offered either to let the plaintiff take

back the furniture or give him a mortgage upon it, which latter he accepted. The jury having found that this mortgage was given by the mortgagor, being insolvent, with intent to give the plaintiff a preference over his other creditors : *Held* that there was evidence to go to them of the mortgagor's insolvency, but that if the mortgage was given under the circumstances stated by him, it was not a preference. A new trial was therefore granted (*Hersee* vs. *White*, 29 Q. B. U. C. 232).

The Act of 1864 does not invalidate conveyances previously executed, and valid when executed (*Gordon* vs. *Young*, 12 Grant, 318).

S. on the 25th November, 1864, agreed to deliver certain timber to plaintiff at T., in New York, in May, June, July, and August, 1865, $1,500 payable down, the same sum on the 15th of January, 1st of March, and 1st of April, 1865, and the balance on delivery at T. On the 14th December following he assigned the timber to L., as security for certain advances in goods which L. agreed to make to enable him to get it out, and on the 27th of February, 1865, formally delivered it to L.'s son, who, after consulting with S., wrote to the plaintiff that S. desired to deliver the timber to the plaintiff, but was in difficulty ; that some of his creditors refused to wait until he could complete his contract, and had commenced actions, and recommending that the plaintiff should anticipate their action by taking a delivery before they could interfere. On the 11th of March the plaintiff accordingly paid L.'s claim, and took a delivery. On the 3rd of March L. had served a writ on S., telling him it was to secure precedence ; and an execution was obtained in this suit, under which the sheriff seized. On the 14th of April S. made an assignment under the Insolvent Act of 1864 to the defendant. He admitted that he was insolvent on the 11th of March, and long previous, though he said he did not then know it, and had not informed the plaintiff of it : *Semble*, that these facts shewed the delivery to the plaintiff to be a transfer by S., "in contemplation of insolvency," the effect of which was to give him "an unjust preference over the other creditors," and that it was therefore void under sec. 8, sub-sec. 4 of the Insolvent Act of 1864 (*Adams* vs. *McColl*, 25 Q. B. U. C., 219).

A person being insolvent sold his property to a creditor, the consideration being a pre-existing debt, and a sum in addition sufficient to make up the price agreed upon as the value of the property sold ; the amount so received by the debtor being by him paid over, with the knowledge of the purchaser, to another creditor ; and three months after this sale the debtor made an assignment under the Insolvent Act. On a bill filed by a creditor, the sale was set aside and a re-sale of the property ordered, the proceeds to be applied in payment of the plaintiff's claim, and the residue, if

any, to be paid over to the Assignee in insolvency (*Coates* vs. *Joslin*, 12 Grant, 524).

A conveyance void against creditors was made in December, 1868, through a third party, to the owner's wife ; the husband in November, 1869, became insolvent, and in June, 1870, joined his wife in a sale of the property to a purchaser without notice ; a conveyance to the purchaser was executed and registered, and the purchaser gave the wife a mortgage for part of the purchase money, and paid her the residue in cash. On a bill by the Assignee in insolvency he was declared entitled to the mortgage, and to any of the money which still remained in the wife's hands, and to any property, real or personal, which she had purchased with the residue, and still owned ; but the court refused to direct an enquiry whether she had separate estate, in order to charge the same with any of the residue which had been spent by her, or with the costs of the suit (*Saunders* vs. *Stull*, 18 Grant, 590).

Two mortgages were created by a debtor in favour of a creditor, whose claim consisted of promissory notes then current. It appeared that the debtor was in insolvent circumstances, and the court considered that both the debtor and creditor contemplated the debtor going into insolvency, which he did shortly afterwards. On a bill filed by the Assignee in insolvency to set aside these mortgages, the court held them void as an "unjust preference" under the Insolvent Acts of 1864 and 1869 (*Payne* vs. *Hendry*, 20 Grant, 142).

Considerable difference of judicial opinion at one time existed as to the correct meaning to be given to the words "in contemplation of bankruptcy," whether they required the existence of an actual intention or determination on the part of the debtor to become a bankrupt, or, whether it was sufficient to satisfy them if the circumstances of the debtor at the time of the transaction were such as to make his bankruptcy, according to some authorities, probable, and, according to others, an inevitable event. The case of *Morgan* vs. *Brundrett*, 5 B. & Ad. 296, is the leading authority in support of the view that actual bankruptcy must be contemplated by the debtor at the time of the transaction ; and the same doctrine was held in the case of *Atkinson* vs. *Brindall*, 2 Bing. N. C. 225 ; *Abbott* vs. *Burbage*, 2 Scott, 656 ; and *Strachan* vs. *Barton*, 11 Ex. 647. The authorities in support of the other construction of the words in question are *Gibson* vs. *Boutts*, 4 M. & G., 169 ; *Gibson* vs. *Muskett*, 4 M & G., 160 ; *Poland* vs. *Glynn*, 4 Bing., 22 n. ; *Ex parte Simpson*, De G. 9 ; *Aldred* vs. *Constable*, 4 Q. B., 674. The doctrine laid down (in *Morgan* vs. *Brundrett*) seems to have gone too far in holding the actual contemplation of bankruptcy by the debtor necessary to constitute a fraudulent preference, and

the correct interpretation of the words in question would seem to have been that which was adopted by Tindal, C. J. (in *Gibson* vs. *Boutts*), namely, that although there might not be in the mind of the debtor at the time of the transaction any actual contemplation of bankruptcy, or intention to become a bankrupt, yet if he was at the time in such a hopeless state of insolvency that he could not reasonably expect to avoid bankruptcy, a payment voluntarily made by him would be considered as made in contemplation of bankruptcy and a fraudulent preference (Robson, 129–30).

Certain payments by debtor void.

134. Every payment made within thirty days next before a demand of an assignment, whenever such demand shall have been followed by an assignment, or by the issue of a writ of attachment, or within thirty days next before the issue of a writ of attachment under this Act, when such writ has not been founded upon a demand, by a debtor, unable to meet his engagements in full, to a person knowing such inability, or having probable cause for believing the same to exist, shall be void, and the amount paid may be recovered back by suit in any competent court, for the benefit of the estate :

Proviso. Provided always, that if any valuable security be given up in consideration of such payment, such security or the value thereof, shall be restored to the creditor before the return of such payment can be demanded.

This section is similar to the 90th section of the Act of 1869.

Action by the Assignee of B. & P., to recover back $190 paid by them to defendant within thirty days next before the assignment, they being then unable to meet their engagements in full, and defendant knowing such inability, or having probable cause for believing it to exist. Plea, on equitable grounds, that before the alleged payment, B. & P., being retail merchants, requested defendant to lend to them for the purpose of carrying on their business, and he did lend, from time to time, various sums of money, upon the express agreement that such moneys should be repaid to defendant out of the proceeds of the daily sales of goods thereafter made by B. & P., and that such proceeds should be held by B. & P. upon trust

to repay, and should be charged with and applied in repaying the defendant the amount lent by him ; that at the time of the payments defendant was the creditor of B. & P. to an amount not less than the $190 for moneys advanced upon the said express agreement, and the moneys paid to defendant by B. & P. were paid out of and formed part of the proceeds of said daily sales, and were applied by defendant upon and on account of the moneys lent to defendant upon the said agreement, and not otherwise :— *Held*, on demurrer, Morrison, J., diss., plea good ; for that the agreement between B. & P. and defendant, gave defendant an equitable claim and mortgage on their goods, which, under the proviso to section 90 of the Insolvent Act of 1869, was a " valuable security given up in consideration of such payment," and which must be restored to defendant before a return of the payment to him could be demanded. Morrison, J., was of opinion that the " valuable security " mentioned in section 90, must be a security recognised in law, which would prevail in the hands of a holder against any creditor, which the creditor, when proving, could shew and describe and value, and capable when so valued of being assigned and delivered to the Assignee for the estate ; and that defendant's equitable claim here was not such a security (*Churcher* vs. *Johnston*, 34 Q. B. 528).

See *Re Wallis*, 29 Q. B. 313 ; *Re Lamb*, 4 P. R. 16 ; and see *Churcher* vs. *Cousins* cited under sec. 130, supra.

Held, that a payment by an insolvent after attachment against him, on account of a draft discounted by defendants for him, and dishonoured by non-acceptance, was recoverable back by the Official Assignee, though the defendants were ignorant of the insolvency when they received the money from him (*Roe* vs. *Royal Canadian Bank*, 19 C. P. 34 ; followed in *Roe* vs. *Bank of British North America*, 20 C. P. 351).

Previous to an act of insolvency certain lands in which the insolvent, a defendant in a suit in chancery, had an equitable interest had been ordered to be sold, and were afterwards sold, and the purchase money paid to the plaintiff in equity, the Assignee in insolvency moved that such moneys be paid into court for the benefit of the general creditors. It was held that the lands were subject to the order for sale and the motion refused (*Yale* vs. *Tollerton*, Chy. Cham. Reports, Rep. 49).

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135. Any transfer of a debt due by the insolvent, made within the time and under the circumstances, in the next preceding section mentioned, or at any

Transfer of certain debts by insolvent void.

time afterwards, whenever such demand shall have been followed by an assignment or by the issue of such writ of attachment, to a debtor knowing or having probable cause for believing the insolvent to be unable to meet his engagements, or in contemplation of his insolvency, for the purpose of enabling the debtor to set up by way of compensation or set-off the debt so transferred, is null and void, as regards the estate of the insolvent; and the debt due to the estate of the insolvent shall not be compensated or affected in any manner by a claim so acquired; but the purchaser thereof may rank on the estate in the place and stead of the original creditor.

This section is similar to the 91st section of the Act of 1869.

To make the purchase invalid the purchaser must at the time be aware or have probable cause for believing the insolvent to be unable to meet his engagements. Public rumour, or judgments, or notes protested, would singly or collectively be ordinarily considered probable cause for believing the insolvency of a trader (see *Adams* vs. *Sinclair & Muir*, in Sup. Court, No. 2313, Judg., 1865, and see numerous cases cited in notes to Section 106, supra).

Purchasing goods on credit by persons knowing themselves unable to pay, to be fraud, and how punishable.

136. Any person who, for himself or for any firm, partnership or company of which he forms part, or as the manager, trustee, agent or employee of any person, firm, co-partnership or company, purchases goods on credit, or procures any advance in money or procures the endorsement or acceptance of any negotiable paper without consideration, or induces any person to become security for him, knowing or believing himself or such person, firm, copartnership or company for which he is acting to be unable to meet his or its engagements, and concealing the fact from the person thereby becoming his

creditor with the intent to defraud such person, or who by any false pretence obtains a term of credit for the payment of any advance or loan of money, or of the price or any part of the price of any goods wares or merchandise, with intent to defraud the person thereby becoming his creditor, or the creditor of such person, firm, copartnership or company, and who shall not afterwards have paid or caused to be paid the debt or debts so incurred, shall be held to be guilty of a fraud, and shall be liable to imprisonment for such time as the court may order not exceeding two years, unless the debt and costs be sooner paid: Provided always, that in the suit or proceeding taken for the recovery of such debt or debts, the defendant be charged with such fraud and be declared to be guilty of it by the judgment rendered in such suit or proceeding. Proviso.

This section is similar to the 92nd section of the Act of 1869.

The mere endorsement of renewal notes by a person insolvent is not a violation of sec. 8, sub-s. 7, of the Act of 1864 (*In re Jones*, 4 P. R. 317; C. L. Chamb. A. Wilson).

A purchase of goods by persons unable to pay their debts in full is not fraudulent within sec. 8, unless such inability is concealed from the creditor with intent to defraud him (*In re Garratt et al.*, 28 Q. B. 266).

Fraud in contracting debts before the Act of 1864 is not to be excluded from consideration in an application to confirm the discharge. Where a trader, all whose property was heavily mortgaged, and who had large overdue debts which he could not pay, obtained credit from Montreal merchants concealing his true position, falsely alleging that he was worth $4,000 more than he owed, and that he had no engagements that he could not meet. This was held such fraud as disentitled him to a discharge (*In re Owens*, 12 Grant, 560).

A trader, after discovering that he could not pay in full, continued his business, which was not shewn to be absurd or unreasonable, that he would thereby be enabled to do so, and in the course of business so continued contracted some new debts but was unsuccessful, and found it necessary

to assign : *Held*, that he was not thereby disentitled to his discharge. In such a case it may or may not be his duty to discontinue his trade, according to circumstances ; continuing may be fraud, but it is not necessarily so (*In re Holt et al.*, 13 Grant, 568. See also *Thurber* vs. *Young et al.* ; *Tempest* vs. *Duchesnay*, and *re Frear* vs. *Gilmour*, cited under section 57 supra).

Fraud must be proved.

137. Whether the defendant in any such case appear and plead, or make default, the plaintiff shall be bound to prove the fraud charged, and upon his proving it, if the trial be before a jury, the judge who tries the suit or proceeding shall immediately after the verdict rendered against the defendant for such fraud (if such verdict is given), or if not before a jury, then immediately upon his rendering his judgment in the premises, adjudge the term of imprisonment which the defendant shall undergo ; and he shall forthwith order and direct the defendant to be taken into custody and imprisoned accordingly ; but such judgment shall be subject to the ordinary remedies for the revision thereof, or of any proceeding in the case.

Award of imprisonment.

This section is similar to the 93rd section of the Act of 1869.

Assignees to be deemed agents for certain purposes. 32-33 V., c. 21.

138. Every Assignee, to whom an assignment is made under this Act, is an agent within the meaning of the seventy-sixth and following sections of the "*Act respecting Larceny and other similar offences*," and every provision of this Act, or resolution of the creditors, relating to the duties of an Assignee, shall be held to be a direction in writing, within the meaning of the said seventy-sixth section ; and in an indictment against an Assignee,

under any of the said sections, the right of property in any moneys, security, matter or thing, may be laid in "the creditors of the insolvent *(naming him)*, under the Insolvent Act of 1875," or in the name of any Assignee subsequently appointed, in his quality of such Assignee.

This section is similar to the 146th section of the Act of 1869.

The following is a copy of the 76th section of the "Act respecting Larceny and other similar offences:"—

"Whosoever having been entrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney or other agent with any money or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security, or any part thereof respectively, or the proceeds or any part of the proceeds of such security for any purpose or to any person specified in such direction, in violation of good faith and contrary to the terms of such direction, in any wise converts to his own use or benefit, or the use or benefit of any person other than the person by whom he has been so intrusted, such money, security or proceeds, or any part thereof, respectively, and whosoever having been intrusted either solely or jointly with any other person as a banker, merchant, broker, attorney, or other agent, with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of the United Kingdom or any part thereof, or of this Dominion of Canada or any province thereof, or of any British colony or possession, or of any foreign state, or in any stock or fund of any body corporate, company or society, for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer or pledge, in violation of good faith, and contrary to the object or purpose for which such chattel, security or power of attorney has been intrusted to him, sells, negotiates, transfers, pledges, or in any manner converts to his own use or benefit, or the use or benefit of any person other than the person by whom he has been so intrusted, such chattel or security, or the proceeds of the same or any part thereof, or the share of interest in the stock or fund to which such power of attorney relates, or any part thereof, is guilty of a misdemeanor, and shall be liable to be imprisoned in the penitentiary for any term not exceeding seven years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without

hard labour, and with or without solitary confinement; but nothing in this section contained relating to agents, shall affect any trustee in or under any instrument whatsoever, or any mortgagee of any property real or personal, in respect to any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage, nor shall restrain any banker, merchant, broker, attorney or other agent from receiving any money due or to become actually due and payable upon or by virtue of any valuable security according to the tenor and effect thereof, in such manner as he might have done if this Act had not been passed, nor from selling, transferring, or otherwise disposing of any securities or effects in his possession upon which he has any lien, claim or demand entitling him by law so to do, unless such sale, transfer or other disposal extends to a greater number or part of such securities or effects than are requisite for satisfying such lien, claim, or demand."

Punishment of Assignee making wilful misstatement.

139. Any Assignee who in any certificate required by this Act shall wilfully misstate or falsely represent any material fact for the purpose of deceiving the judge, the creditors, or the inspectors, shall be guilty of a misdemeanor, and shall be liable, at the discretion of the court before which he shall be convicted, to imprisonment for a term not exceeding three years.

This section is new.

Certain acts by insolvents to be misdemeanors.

140. From and after the coming into force of this Act, any insolvent who, with regard to his estate,—or any president, director, manager or employee of any copartnership, or of any incorporated company not specially excepted in the first section of this Act, with regard to the estate of such copartnership or company, who shall do any of the acts or things following with intent to defraud, or defeat the rights of his or its creditors, shall be guilty of a misdemeanor, and shall be liable, at the discretion

of the court before which he is convicted, to punishment by imprisonment for not more than three years, or to any greater punishment attached to the offence by any existing Statute.

Not fully discovering or not delivering property, books, papers, &c.

If he does not upon examination fully and truly discover to the best of his knowledge and belief, all his property, real and personal, inclusive of his rights and credits, and how and to whom, and for what consideration, and when he disposed of, assigned or transferred the same or any part thereof, except such part has been really and *bona fide* before sold or disposed of in the way of his trade or business, or laid out in ordinary family or household expenses, and fully, clearly and truly state the causes to which his insolvency is owing; or shall not deliver up to the Assignee all such part thereof as is in his possession, custody or power, (except such part thereof as is exempt from seizure as hereinbefore provided), and also all books, papers and writings in his possession, custody or power relating to his property or affairs;

Removing property.

If, within thirty days prior to the demand of assignment, or the issue of a writ of attachment under this Act, he doth, with intent to defraud his creditors, remove, conceal or embezzle any part of his property to the value of fifty dollars or upwards;

Not denouncing false claims.

If, in case of any person having to his knowledge or belief proved a false debt against his estate, he fail to disclose the same to his Assignee within one month after coming to the knowledge or belief thereof;

False schedule.

If, with intent to defraud, he wilfully and fraudulently omits from his schedule any effects or property whatsoever;

Withholding books, &c. If, with intent to conceal the state of his affairs, or to defeat the object of this Act, or of any part thereof, he conceals, or prevents, or withholds the production of any book, deed, paper or writing relating to his property, dealings or affairs;

Falsifying books. If, with intent to conceal the state of his affairs or to defeat the object of the present Act or of any part thereof, he parts with, conceals, destroys, alters, mutilates or falsifies, or causes to be concealed, destroyed, altered, mutilated or falsified, any book, paper, writing or security or document relating to his property, trade, dealings or affairs, or makes, or is privy to the making of any false or fraudulent entry or statement in or omission from any book, paper, document or writing relating thereto;

Stating fictitious losses. If, at his examination at any time, or at any meeting of his creditors held under this Act, he attempts to account for the non-production or absence of any of his property by fictitious losses or expenses;

Disposing of goods not paid for. If, within the three months next preceding the demand of assignment, or the issue of a writ of attachment in liquidation, he pawns, pledges or disposes of, otherwise than in the ordinary way of his trade, any property, goods or effects, the price of which remains unpaid by him during such three months.

This section is similar to the 147th section of the Act of 1869.

Offences against this Act, how tried. **141**. Every offence punishable under this Act shall be tried as other offences of the same degree are triable in the Province where such offences are commited.

This section is somewhat similar to the 148th section of the Act of

1869, except that the above section does not require that a special jury be empanelled, as provided by that section.

Creditors taking consideration for granting discharge &c.

142. If any creditor of an insolvent, directly or indirectly, takes or receives from such insolvent, any payment, gift, gratuity or preference, or any promise of payment, gift, gratuity or preference as a consideration or inducement to consent to the discharge of such insolvent, or to execute a deed of composition and discharge with him; or if any creditor knowingly ranks upon the estate of the insolvent for a sum of money not due to him by the insolvent or by his estate, such creditor shall forfeit and pay a sum equal to treble the value of the payment, gift, gratuity or preference so taken, received or promised, or treble the amount improperly ranked for, as the case may be, and the same shall be recoverable by the Assignee for the benefit of the estate, by suit in any competent court, and when recovered shall be distributed as part of the ordinary assets of the estate.

Penalty.

This section is similar to the 149th sect. of the Act of 1869.

Punishment of insolvent receiving money, &c., and not handing the same to Assignee.

143. If, after a demand is made for the issue of a writ of attachment in insolvency, or for an assignment of his estate under this Act, as the case may be, when such demand shall be followed by the issue of a writ of attachment or by an assignment under this Act, the insolvent retains or receives any portion of his estate or effects, or of his moneys, securities for money, business papers, documents, books of account, or evidences of debt, or any sum or sums of money, belonging or due to him, and

retains and withholds from his Assignee, without lawful right, such portion of his estate or effects, or of his moneys, securities for money, business papers, documents, books of account, evidences of debt, sum or sums of money, the Assignee may make application to the judge, by summary petition, and after due notice to the insolvent, for an order for the delivery over to him of the effects, documents, or moneys so retained; and in default of such delivery in conformity with any order to be made by the judge upon such application, such insolvent may be imprisoned in the common gaol for such time, not exceeding one year, as such judge may order.

Imprisonment for disobeying order.

This section is similar to the 150th section of the Act of 1869.

The Act of 1864 did not make any provision for the cases specified in this section. The amended Act, 29th Vict., chap. 18, sec. 29, supplied the omission. The above section is copied from that Act, and under it it has been held in Montreal, where an insolvent received a sum of money during the interval between date of notice of meeting of creditors and the appointment of an Assignee, and refused to pay it to the Assignee, that this was retaining and withholding without lawful right, within the meaning of the Act (*In re Warmington;* Jones, Assignee: 12, L. C. Jurist, 237).

Certain documents to be evidence.

144. The deeds of assignment and of transfer, or in the Province of Quebec authentic copies thereof, or a duly authenticated copy of the record of the appointment of the Assignee certified by the clerk or prothonotary of the court in which such record is deposited, under the seal of such court, shall be *prima facie* evidence in all courts, whether civil or criminal, of such appointment, and of the regularity of all proceedings at the time thereof and antecedent thereto.

This section is similar to the 151st section of the Act of 1869.

BUILDING AND JURY FUND.

145. One per centum upon all moneys proceeding from the sale by an Assignee, under the provisions of this Act, of any immovable property in the Province of Quebec, shall be retained by the Assignee out of such moneys, and shall, by such Assignee be paid over to the sheriff of the district, or of either of the Counties of Gaspé or Bonaventure, as the case may be, within which the immovable property sold shall be situate, to form part of the Building and Jury Fund of such district or county. Contribution to Building and Jury Fund in Quebec.

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146. The Governor in Council shall have all the powers with respect to imposing a tax or duty upon proceedings under this Act, which are conferred upon the Governor in Council by the thirty-second and thirty-third sections of the one hundredth and ninth chapter of the Consolidated Statutes for Lower Canada, and by the Act intituled: *An Act to make provisions for the erection or repair of court houses and gaols at certain places in Lower Canada* (12 Vict., chap. 112). Governor in Council have certain powers.

PROCEDURE IN THE CASE OF INCORPORATED COMPANIES.

147. The provisions of this Act shall apply to the estates of incorporated companies, not specially excepted in the first section of this Act, subject to the following modifications:— Provisions for Incorporated Companies.

Preliminary notice.

(1.) No writ of attachment shall issue against the estate of an incorporated company except upon the order of the judge, and after notice of at least forty-eight hours has been given to such company of the application for such writ. The judge in all cases where proceedings have been adopted under this Act against an incorporated company, may, before granting a writ of attachment, order the Official Assignee to enquire into the affairs of the company, and to report thereon within a period not exceeding ten days from the date of such order:

Inquiry by Assignee.

Company to exhibit books, &c.

(2.) Upon such order it shall be the duty of such company, and of the president, directors, managers and employees thereof, and of every other person, having possession or knowledge thereof, to exhibit to the Official Assignee, or to his deputy, the books of account together with all inventories, papers, and vouchers referring to the business of the company, or of any other person; and generally to give all such information as may be required by the Official Assignee to form a just estate of the said company; and any refusal on the part of the said president, directors, managers or employees of the company to give such information shall, on evidence of such refusal be considered as a contempt of an order of the court or judge, and punishable by fine or imprisonment or by both at the discretion of the judge:

Refusal to be contempt of Court.

After service of order, company to hold property in trust.

(3.) From the time the above order is served upon the company, the president, directors, managers and employees thereof, and all other persons having the control or possession of its affairs or property, shall hold the estate and property of the said company upon trust for the creditors of the said company, and

shall be bound to account for all the property of the said company under the same obligations, liabilities, and responsibilities as trustees appointed by courts of law or equity in the several Provinces, or as guardians and sequestrators in the Province of Quebec, are bound:

Meeting of creditors may be called.

(4.) Upon the report of the Official Assignee or before any order is given for the examination into the affairs of the company, as herein provided, the judge may order that a meeting of the creditors be called and held in the manner provided for by this Act for the first meeting of creditors, at which meeting the creditors present, who shall verify their claims under oath, may pass such resolutions either for the winding up of the affairs of the company or for allowing the business thereof to be carried on as they may deem most advantageous to the creditors; and may also appoint two inspectors and indicate the mode in which the business of the company should be wound up or should be continued:

Resolutions thereat.

To be submitted to judge.

(5.) The resolutions so adopted shall be submitted to the judge at the time and place appointed at the meeting, and at least forty-eight hours' notice shall be given by the Official Assignee to the company of the time and place so fixed:

Powers of judge in relation thereto.

(6.) The judge, after hearing such creditors as may be present, the Assignee and the company, may confirm, reject, or modify the said resolutions; and he may order the immediate issue of a writ of attachment to attach the estate of the company, or direct that the issue of such writ shall be suspended for a period not exceeding six months—during which period he may order that the Official Assignee or the inspectors (if any have been appointed by the cre-

Order may be made by judge.

ditors) shall exercise a general supervision over the estate and business of the said company by requiring from the president, directors, managers and employees of the company, such periodical accounts and statements, of the business done, and of the moneys received and expended or disbursed since the last statement as may be required by the said inspectors or the said Official Assignee to obtain a proper knowledge of the affairs of the company:

Receiver may be appointed.

(7.) The judge may also, if he deems it for the advantage of the creditors, appoint a receiver, charged with such duties as to the superintendence or management of the affairs of the company as may be imposed upon him by the order of the judge; and who shall also assume and be invested with all the powers vested in the directors and stockholders respecting the calling in and collecting of the unpaid stock of the company, and subject to such orders and directions as he may, from time to time, receive from the judge:

To render account.

(8.) Such receiver shall account, whenever ordered by the court or judge, for all moneys or property he may have received from the estate:

Further meeting within six months.

(9.) Before the expiration of the six months next after such order, the Official Assignee or the receiver, as the case may be, shall cause another meeting of the creditors to be called:

Further delay may be granted

(10.) On the resolutions adopted at such meeting the judge may either grant a further delay not exceeding six months, or cause a writ of attachment to issue at the instance of any creditor or creditors.

If demands are unsatisfied estate of company

(11.) If, at the expiration of such prolonged delay the demands made upon the company to place it in liquidation have not been satisfied, the judge shall

order the issue of a writ of attachment; and the estate of the said company shall be wound up under the provisions of this Act, unless the creditor or creditors entitled to such writ shall consent to a further delay: may be wound up.

(12.) Nothing in this section shall prevent the judge before the expiration of the delays he may have granted under the preceding sub-sections, from cancelling the orders so given by him, and from ordering the issue of a writ of attachment or from releasing the company from the effect of any such order, as circumstances may require: Judge may modify orders.

(13.) The president, directors, managers or other officers or employees of the company, and any other person, may be examined by the Assignee or by the judge on the affairs of the company, and each of them shall, for refusal to answer questions put in reference to the business within his own cognizance, be liable to the same penalties as ordinary traders refusing to answer questions put under the provisions of this Act: Officers of company may be examined.

(14.) The remuneration of the Official Assignee and of the receiver for services performed under the preceding sub-sections shall be fixed by the judge: Remuneration of Assignee and receiver.

(15.) Nothing in the preceding sub-sections shall prevent the president, directors, managers or employees of the company, on being duly authorized to that effect, from making an assignment of the estate of such company to an Official Assignee in the form provided for by this Act, before the expiration of the delays which may have been granted to such company by the court or judge. Company may make an assignment pending delay.

This section is new.

The meeting of creditors to be held under sub-section 4, is to be called as provided by section 20.

GENERAL PROVISIONS.

Commencement of foregoing provisions.

148. The foregoing provisions of this Act shall come into force and take effect upon, from and after the first day of September, in the present year 1875, and not before, except in so far as relates to the appointment of Official Assignees, and the making and framing of rules, orders, and forms, to be followed and observed in proceedings under this Act, with respect to which the said provisions shall be in force from the time of the passing of this Act.

Insolvent Acts of 1864 and 1869 and Acts amending them and Acts of B. C. and P. E. I. continued to 1st Sept. and then repealed; saving certain proceedings and matters.

149. "*The Insolvent Act of* 1864," and the Act to amend the same passed by the Parliament of the late Province of Canada, in the twenty-ninth year of Her Majesty's reign, "*The Insolvent Act of* 1869," the Act amending the same passed in the thirty-third year of Her Majesty's reign, and the Act amending the same passed in the thirty-fourth year of Her Majesty's reign, and the Act passed in the thirty-seventh year of Her Majesty's reign continuing the same, the Act passed by the Legislature of Prince Edward Island in the thirty-first year of Her Majesty's reign, chaptered fifteen, intituled "*An Act for the relief of unfortunate debtors*," and the several Acts amending and continuing the same which are in force in the said Province of Prince Edward Island, which are mentioned in and continued by the last mentioned Act passed in the thirty-seventh year of Her Majesty's reign, the Act of the legislature of the Colony of Vancouver Island, passed in

year 1862, and intituled "*An Act to declare the law relative to Bankruptcy and Insolvency in Vancouver Island and its dependencies,*" and the Act of the legislature of the Colony of British Columbia, passed in the year 1865, and intituled "*An Ordinance to amend the law relative to Bankruptcy and Insolvency in British Columbia,*" and all Acts of the said Legislatures, or either of them, amending the same, are hereby continued in force to the first day of September in the present year 1875, after which date the same shall be repealed, except so far as regards proceedings commenced and then pending thereunder, and also as regards all contracts, acts, matters and things made and done before such repeal, to which the said Acts or any of the provisions thereof would have applied if not so repealed, and especially such as are contrary to the provisions of the said Acts. having reference to fraud and fraudulent preferences, and to the enregistration of marriage contracts within the Province of Quebec; and as to all such contracts, acts, matters and things, the provisions of the said Acts shall remain in force, and shall be acted upon as if this Act had never been passed: Provided always, that as respects matters of procedure merely, the provisions of this Act shall upon and after the said first day of September, in the present year, 1875, supersede those of the said Acts even in cases commenced and then pending, except cases pending before any Official Assignee, in his judicial capacity: And all securities given under the said Acts shall remain valid, and may be enforced, in respect of all matters and things falling within their terms, whether on, before or after the day last aforesaid; and especially all securities

Proviso. Procedure under this Act to apply and supersede that under said Acts.

Securities to remain valid.

Inconsistent Acts repealed.

theretofore given by Official Assignees shall serve and avail hereafter as if given under this Act. All other Acts and parts of Acts now in force in any of the Provinces to which this Act applies, which are inconsistent with the provisions of this Act, are hereby repealed.

Act to apply to all the Provinces of Canada.

150. The foregoing provisions of this Act shall apply to each and every the Provinces in the Dominion of Canada.

Certain provisions of 32, 33 Vict., c. 16, to apply to Manitoba until 1 Sep., 1875.

151. The provisions of "*The Insolvent Act of* 1869," applied by Schedule A of the Act thirty-fourth Victoria, chapter thirteen, to insolvents resident in the Province of Manitoba, shall continue to apply to such insolvents, in the case of composition and discharge mentioned in the said provisions, until the said first day of September, 1875, until which day the said provisions are hereby continued in force for that purpose, and upon, from and after the said day the same shall be repealed, subject to the like exceptions and provisions as are made in the next preceding section but one, as to the Acts and laws repealed by the said section; and in the provisions so continued in force "The Court" shall mean the Court of Queen's Bench of Manitoba, and "The Judge" shall mean the Chief Justice or one of the Puisné Judges of the said Court.

"Court" and "Judge," what to mean.

Short title.

152. This Act shall be known and may be cited as "*The Insolvent Act of* 1875."

FORM A.

INSOLVENT ACT OF 1875

To (*name residence and description of insolvent.*)

You are hereby required, to wit, by A. B. a creditor for the sum of $ (*describe in a summary manner the nature of the debt,*) and by C. D., a creditor, &c., to make an assignment of your estate and effects under the above mentioned Act, for the benefit of your creditors.

place *date.*

Signature of Creditor or Creditors.

FORM B.

INSOLVENT ACT OF 1875.

CANADA,
Province of
District of

A. B.———, (*name, residence and description,*)
Plaintiff,

VS.

C. D.———, (*name, residence and description,*)
Defendant.

I, A. B.———, (*name, residence and description*) being duly sworn, depose and say:—

1. I am the Plaintiff in this cause (*or* one of the Plaintiffs, *or* the clerk, *or* the agent of the Plaintiff in this cause duly authorized for the purposes thereof.)

2. The Defendant is indebted to me (*or* to the Plaintiff, *or*

as the case may be) in the sum of dollars currency, for (*state concisely and clearly the nature of the debt.*)

8. To the best of my knowledge and belief the Defendant is insolvent within the meaning of the Insolvent Act of 1875, and has rendered himself liable to have his estate placed in liquidation under the said Act; and my reasons for so believing are as follows : (*state concisely the facts relied upon as rendering the debtor insolvent and as subjecting his estate to be placed in liquidation.*)

4. I do not act in this matter in collusion with the Defendant, nor to procure him any undue advantage against his Creditors.

And I have signed; (*or* I declare that I cannot sign.)

Sworn before me this
day of 187 .

and if the deponent cannot sign, add :
—the foregoing affidavit having been first read over by me to the deponent.

FORM C.

INSOLVENT ACT OF 1875.

CANADA,
PROVINCE OF
District of

} VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

No.

To the Official Assignee of the County (*or* Judical District *or* Electoral District *as the case may be*) of

GREETING :

WE command you, at the instance of

to attach the estate and effects, moneys and securities, or money, vouchers, and all the office and business papers and documents of every kind and nature whatsoever,

of and belonging to if the same shall be found in (*name of district or other territorial jurisdiction*) and the same so attached, safely to hold, keep and detain in your charge and custody until the attachment thereof, which shall be so made under and by virtue of this Writ shall be determined in due course of law.

We command you also to summon the said to be and appear before Us, in our Court for at in the County (*or* District) of on the day of to show cause, if any he hath, why his estate should not be placed in liquidation under the Insolvent Act of 1875, and further to do and receive what, in Our said Court before Us, in this behalf shall be considered ; and in what manner you shall have executed this Writ, then and there certify unto Us with your doings thereon, and every of them, and have you then and there also this Writ,

In Witness Whereof, We have caused the Seal of our said Court to be hereunto affixed, at aforesaid, , this day of in the year of Our Lord, one thousand eight hundred and seventy- , year of Our Reign.

FORM D.

Insolvent Act of 1875.

A. B.,
Plaintiff.

C. D.,
Defendant.

A Writ of attachment has issued in this cause,
(*Place* *date.*)

(*Signature,*)
Official Assignee.

FORM E.

INSOLVENT ACT OF 1875.

This assignment made between of the first part, and of the second part, witnesses,

(*or*)

On this day of
before the undersigned notaries
came and appeared
of the first part, and
of the second part, which said parties declared to us notaries:—

That under the provisions of "The Insolvent Act of 1875", the said party of the first part, being insolvent, has assigned and hereby does assign to the said party of the second part, accepting thereof as Assignee under the said Act, and for the purposes therein provided, all his estate and effects, real and personal, of every nature and kind whatsoever.

To have and to hold to the party of the second part as Assignee for the purposes and under the Act aforesaid.

In witness, whereof, &c.

(*or*)

Done and passed, &c.

FORM F.

Insolvent Act of 1875.

In the matter of A. B. an Insolvent.

Schedule of Creditors.

1. Direct Liabilities.

Name.	Residence.	Nature of Debt.	Amount.

2. Indirect liabilities, maturing before the day fixed for the first meeting of creditors.

Name.	Residence.	Nature of Debt.	Amount.

3. Indirect liabilities, maturing after the day fixed for the first meeting of creditors.

Name.	Residence.	Nature of Debt.	Amount.

4. Negotiable paper, the holders of which are unknown.

Date.	Name of Maker.	Names liable to Insolvent.	When due.	Amount.

Total.

FORM G.

INSOLVENT ACT OF 1875.

In the matter of an Insolvent.

The Insolvent has made an assignment of his estate to me, (*or*, a writ of attachment has been issued in this cause) and the creditors are notified to meet at in on the day of at o'clock to receive statements of his affairs,and to appoint an Assignee if they see fit.

(*Date and residence of Assignee.*)

(*Signature.*)

Assignee.

(*The following is to be added to the notices sent by post.*)

The creditors holding direct claims and indirect claims for one hundred dollars each and upwards, are as follows: (*names of creditors and amount due*) and the aggregate of claims under one hundred dollars is $

(*Date.*)

(*Signature.*)

FORM H.

INSOLVENT ACT OF 1875.

In the matter of A. B., an Insolvent.

This deed of release (*or* transfer) made under the provisions of the said Act between (C. D.,) Assignee to the estate of the said Insolvent of the first part; and (E. F.,) of the second part, witnesseth:

That whereas by a resolution of the creditors of the insolvent, duly passed at a meeting thereof duly called and held at , on the day of , the said party of the second part was duly appointed Assignee to the estate of the said insolvent: Now therefore,these presents witness that the said party of the first

part, in his said capacity, hereby releases (*or* transfers) to the said party of the second part the estate and effects of the said insolvent, in conformity with the provisions of the said Act; and for the purposes therein provided.

In witness whereof, &c.

(*This form may be adapted in the Province of Quebec to the notarial form of execution of documents prevailing there.*)

FORM I.

INSOLVENT ACT OF 1875.

In the matter of

A. B. (*or* A. B. & Co.,)
An Insolvent.

I, the undersigned, (*name and residence*) have been appointed Assignee in this matter.

Creditors are requested to file their claims before me within one month.

(*Place date.*)

(*Signature,*)
Assignee.

FORM J.

INSOLVENT ACT OF 1875.

CANADA,
PROVINCE OF
District (*or* County of

In the (*name of Court.*)
In the matter of A. B. (*or* A. B. & Co.,) an Insolvent.

The undersigned has filed in the office of this Court, a consent by his Creditors to his discharge (*or* a deed of composition and discharge executed by his Creditors) and on the day of next, he will apply to the said Court (*or* to the Judge of the said Court, *as the case may be*) for a confirmation of the discharge thereby effected.

(*Place, date.*)

(*Signature of Insolvent, or of his Attorney ad litem.*)

FORM K.

INSOLVENT ACT OF 1875.

In the matter of A. B.,

An Insolvent.

I, A. B., of an Insolvent, now making application to the for a confirmation of my discharge (*or* of my deed of composition and discharge) being duly sworn, depose and say:

That no one of my Creditors who have signed the said discharge (*or* the said deed of composition and discharge) has been induced so to do by any payment, promise of payment, or advantage whatsoever, made, secured, or promised to him by me or, with my knowledge, by any person on my behalf.

And I have signed.

Sworn before me at
this day of
187

FORM L.

INSOLVENT ACT OF 1875.

CANADA,
PROVINCE OF
District (*or* County) of

In the (*name of Court*)
In the matter of A. B. (*or* A. B. & Co)
An Insolvent.

On the day of next, the undersigned will apply to the said Court (*or* the Judge of the said Court, *as the case may be,*) for a discharge under the said Act.

(*Place date.*)

(*Signature of the Insolvent, or of his Attorney ad litem.*)

FORM M.

INSOLVENT ACT OF 1875.

In the matter of A. B.,
An Insolvent.

In consideration of the sum of $ whereof quit;

C. D., Assignee of the insolvent, in that capacity hereby sells and assigns to E. F. accepting thereof all claim by the insolvent against G. H. of (*describing the debtor*) with the evidences of debt and securities thereto appertaining, but without any warranty of any kind or nature whatsoever.

C. D., Assignee.
E. F.

FORM N.

This deed, made under the provisions of the Insolvent Act of 1875, the day of &c., between A. B. of &c., in his capacity of Assignee of the estate and effects of , an insolvent, under a deed of assignment executed on the day of at in and of a release made and executed on the day of , in (*or* under an order of the Judge made at on the day of) of the one part, and C. D., of &c., of the other part, witnesseth: That he, the said A. B., in his said capacity, hath caused the sale of the real estate hereinafter mentioned, to be advertised as required by law, and hath adjudged (*or* and hath offered for sale pursuant to such advertisement, but the bidding therefor being insufficient did withdraw the same from such sale, and hath since by authority of the creditors agreed to sell) and doth hereby grant, bargain, sell and confirm the same, to wit: unto the said C. D., his heirs and assigns for ever, all (*in Ontario, Nova Scotia and New Brunswick, Manitoba and British Columbia, insert* "the rights and interests of the insolvent in") that certain lot of land, &c., (*insert here a description of the property sold*): To have and to hold the same, with the appurtenances thereof, unto the said C. D., his heirs and

assigns for ever. The said sale is so made for and in consideration of the sum of $ in hand paid by the said C. D. to the said A. B., the receipt whereof is hereby acknowledged (*or* of which the said C. D. hath paid to the said A. B.) the sum of the receipt whereof is hereby acknowledged, and the balance, or sum of $ the said C. D. hereby promises to pay to the said A. B., in his said capacity, as follows, to wit:—(*here state the terms of payment*)—the whole with interest payable and as security for the payments so to be made, the said C. D. hereby specially mortgages and hypothecates to and in favour of the said A. B., in his said capacity, the lot of land and premises hereby sold.)

In witness, &c.

A. B. [L. S.]
C. D. [L. S.]

Signed, sealed and delivered
in the presence of
E. F.

(*This form shall be adopted in the Province of Quebec to the notarial form of execution of documents prevailing there.*)

FORM O.

INSOLVENT ACT OF 1875.

In the matter of

A. B. (*or* A. B. & Co.,)
An Insolvent.

A dividend sheet has been prepared, open to objection until the day of , after which dividend will be paid.

(*Place,* *date.*)

Signature of Assignee.

FORM 1. See Sec. 4.

Insolvent Act of 1875.

In the County Court of the County of

A. B., (*name, residence and description*) Plaintiff
vs.
E. F., (*name, residence and description,*) Defendant.

I, A. B. (*name, residence and description*), being duly sworn depose and say:

1. That I am the plaintiff (*or* the duly authorized agent of the plaintiff in this behalf, and have a personal knowledge of the matter hereinafter deposed to, *or* a member of the firm of plaintiffs in this matter, and the said firm is composed of myself and E. F.)

2. That the defendant is indebted to me (*or* to the plaintiff as the case may be) in the sum of $ for (*state concisely and clearly the nature of the debt.*)

3. I do not act in this matter in collusion with the defendant nor to procure him any undue advantage against his creditors. And I have signed (*or* declared I cannot sign).

Sworn before me at the of in the County of this day of A.D. 187

and if the deponent cannot sign, add:— "the affidavit having been first read and explained to the said A. B., who seemed perfectly to understand the same, and made his mark in my presence."

FORM 2. See Sec. 4.

Insolvent Act of 1875.

To (*name, residence and description of Insolvent*), you are hereby to wit by A. B., a Creditor for the sum of $ (*describe in a customary manner the nature of the debt*), and by

C. D., a Creditor, &c., to make an assignment of your estate and effects under the above-mentioned Act, for the benefit of your Creditors and we (*the said A. B. and C. D.*), hereby elect and appoint the office of
in the of in the County of at which service of any answer, notice or proceeding may be served on us or on the said G. H., or any of his partners or clerks for us.

FORM 3. See Sec. 29.

Know all men by these presents that we A. B., of &c., C. D., of &c., and E. F., of &c., are jointly and severally held and firmly bound to Her Majesty, Queen Victoria, in the sum of $ to be paid to Her said Majesty, Her successors or assigns, for which payment to be made we bind ourselves each and every of us in the whole, our and each of our heirs, executors and administrators jointly and severally firmly by these presents. Sealed with our seals and dated this day of one thousand eight hundred and

Whereas on the day of one thousand eight hundred and G. H., of &c., made an assignment of his estate and effects under the Insolvent Act of 1875, to I. J., of &c.

And whereas at the first meeting of the creditors of the said Insolvent under the said Act, the said A. B. was appointed assignee of the said Insolvent, under the said Act. And whereas it was resolved that the said assignee should give security by bond to Her said Majesty the Queen in the sum of $ with two sufficient sureties thereto: Now therefore the condition of this obligation is such that if the said A. B. shall and do from time to time well and sufficiently perform and execute all and singular the duties required of him as assignee as aforesaid or any rule of

Court made or hereafter to be made under the said Act, this obligation shall be void, otherwise to remain in full force and virtue.

A. B. [L. S.]
C. D. [L. S.]
E. F. [L. S.]

Signed, sealed and delivered
in the presence of

FORM 4. See Sec. 49.

INSOLVENT ACT OF 1875.

THIS INDENTURE, made the day of one thousand eight hundred and seventy Between (hereinafter called the Insolvent) of the first part

And the several persons, firms and corporations who are Creditors of the said Insolvent (hereinafter called the Creditors) of the part

WHEREAS the said Insolvent ha become involved and unable to pay liabilities in full and Creditors have agreed with for a composition and discharge in the manner hereinafter set out. And whereas the said Insolvent ha agreed to secure the composition payments hereinafter mentioned by

Now therefore this Indenture witnesseth that in consideration of indebtedness and of the discharge hereby given, the said Insolvent covenant and agree with all Creditors collectively and severally, that will pay to them and to each of them respectively a composition of cents in the dollar of their respective claims against in manner and at the times following namely: And that will give to each of them promissory notes for such composition payments bearing date the day of and payable at the said several dates respectively

And in consideration of the said composition payments so to be made and of the said security so to be given the said Creditors do and each of them doth release and discharge unto the said Insolvent all their respective claims against (saving and reserving the rights which any of them may have against any other person or in respect of any security held by them or any of them). And they do hereby direct and authorise the Official Assignee or any Assignee of the estate and effects of the said Insolvent who may at any time be appointed to deliver up and convey to the said Insolvent all estate and effects upon this deed of composition and discharge being executed by a majority in number and value of the Creditors sufficient to procure the due confirmation thereof.

And it is declared and agreed that this Deed of Composition and Discharge is made in pursuance of the Insolvent Act of 1875 and may be confirmed in pursuance of the provisions thereof. And also that the same shall be ineffectual unless and until the same shall be executed by such a majority in number and value of the said Creditors as shall be sufficient to procure the due confirmation thereof.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals.

Signed, sealed and delivered by each party hereto, in the presence of the witness whose name is set opposite to each signature respectively.

INSOLVENT ACT OF 1875.

In the matter of

An Insolvent.

I, of the of

make oath and say that I was personally present, and saw

the hereunto annexed Deed of Composition and Discharge duly executed, signed, sealed and delivered by

at

2. That I am a subscribing witness to such execution thereof.

Sworn before me at the
in the County
of this
day of A.D. 187

A Commissioner, &c.

FORM 4A. See Sec. 49.

INSOLVENT ACT OF 1875.

In the matter of A. B. an Insolvent.

Upon application of the above-named Insolvent, and upon reading the petition presented by him for the confirmation of the discharge effected in his favour by a certain Deed of Composition and Discharge, executed under the provisions of the Insolvent Act, and filed in this Honorable Court, and the several affidavits and papers filed in support thereof and it appearing that on the day of 187 , the said Insolvent made an assignment of his estate and effects under the provisions of the said Act, and that on or about the day of A.D. 187 the said Insolvent procured the execution of a Deed of Composition and Discharge by a majority in number of those of his creditors, who are respectively creditors for the sum of $100 00 and upwards, and who represented at least three-fourths in value of his liabilities, and it also appearing that due notice had been given of the application for the confirmation of the discharge thereby effected in his favour in accordance with the provisions of the said Act, and upon hearing the said Insolvent by his attorney and no cause

being shewn to the contrary, and it appearing to me to be expedient to grant the prayer of the said Petitioner :—

I do order that the discharge effected by the said deed be and the same is absolutely confirmed and I do further order that the above-named Insolvent be absolutely discharged of and from all debts and claims existing, due or becoming due by him at the date of the said assignment and provable against his estate, and I do hereby by virtue of the power vested in me by the said Act, absolutely discharge and declare him to be absolutely discharged therefrom.

In witness whereof I have hereunto set my hand and caused the seal of the said Court to be affixed, this day of A.D. 187

(Signed) (*Seal of Court*)

Judge of the County Court of in the County of

FORM No. 5. See Sec. 64.

INSOLVENT ACT OF 1875.

DOMINION OF CANADA, Province of County of } In the County Court of the County of

In the matter of A. B. an Insolvent.

To his Honor,

The Judge of the

The Petition of A. B., of &c., the above-named Insolvent sheweth, as follows :—

1. That your Petitioner was a trader within the meaning of the said Act, doing business in the said

2. That your Petitioner the said Insolvent being unable to meet his engagements as such trader as aforesaid, on the day of made an assignment under the above-mentioned Act, of all his estate and effects

to C. D., of &c., official assignee, resident in and duly appointed in that behalf for the said County, who duly accepted and acted under the said assignment.

3. That at the meeting of the Creditors of your Petitioner, the said Insolvent, duly called pursuant to the said Act, and held at on the day of E. F., of &c., was duly appointed, pursuant to the said Act, assignee to my said estate, and duly accepted the same.

4. That a duplicate of the said assignment with a list of the Creditors of your Petitioner thereto annexed, was filed and deposited in the office of the Clerk of this Honorable Court, at on in which said Court all proceedings in the matter of your Petitioner's Insolvency have been carried on.

5. That the deed of transfer from the said C. D. to the said E. F. was filed and deposited in the said office on

6. That more than a year has elapsed since your Petitioner made the assignment as aforesaid, and he has not obtained from the required proportion of his creditors a consent to his discharge or the execution of a deed of composition and discharge.

7. That due notice of your Petitioner's intention to apply to the Judge of this Honorable Court for a discharge has been given as your Petitioner verily believes.

8. That your Petitioner at the time of making the said assignment was, and still is, and constantly has been since the making of the said assignment a resident of and domiciled within the said County of

9. That your Petitioner has in all things conformed himself to the requirements of the said Act, and is not aware of any reason against or obstacle to his obtaining a discharge thereunder.

Your Petitioner therefore prays :—

1. That your Honor may grant him an absolute

discharge of and from all debts or claims existing, due or accruing due by him at the date of the said assignment and proveable against his estate, and that such other order may be granted as to your Honor may seem meet.

FORM No. 6. See Sec. 6.

INSOLVENT ACT OF 1875.

DOMINION OF CANADA.
Province of
County of
To Wit.

In the County Court of the Court of

In the matter of

A. B.

An Insolvent.

Upon the application of A. B. (*residence and occupation*) the above-named Insolvent, and upon reading the assignment made by him under the said Act on the day of one thousand eight hundred and seventy to C. D., of the said County, an Official Assignee of the said County, the list of creditors annexed to said assignment and therewith deposited in the office of the said Court on the day of one thousand eight hundred and the deed of transfer from the said C. D. to E. F., of (*residence and occupation*) as Assignee appointed at a meeting of creditors of the said Insolvent for that purpose, held at the office of the said C. D., in the said of on the day of one thousand eight hundred and bearing date the day of one thousand eight hundred and and filed in the office of the Honorable Court on the

day of following. And upon reading the petition of the said Insolvent, presented to me in pursuance of the said Act, on the day of instant, praying for a discharge under the said Act and a certificate from the said E. F. to the effect that there is no objection within his knowledge to the granting of such discharge, and upon reading the other affidavits and papers filed herein and upon hearing the said Insolvent by his Attorney, and no cause being shewn to the contrary and it appearing expedient to me to grant the prayer of such petition:

I do order that the above-named Insolvent be absolutely discharged of and from all debts and claims existing, due or becoming due by him at the date of the said assignment and provable against his estate and for which a discharge can be granted by me, and I do hereby by virtue of the power vested in me by the said Act absolutely discharge and declare him to be absolutely discharged therefrom [*and* I do hereby order the suspension of the operation of this discharge for years] (*or* I do hereby declare this discharge to be of the second class as provided by the said Act).

In Witness whereof I have hereunto set my hand and caused the seal of the said Court to be affixed this day of one thousand eight hundred and

Signed. (*Seal of Court*)

Judge.

ADDENDA ET ERRATA.

Page 37.—Add to notes to sect. 1 :—

A married woman was sued at law under 33 & 34 Vic., cap. 93, sect. 12 (Imp. Act), by a creditor for a debt contracted by her before her marriage, which took place in 1872, and a judgment was obtained against her. The creditor then sued out a debtor's summons, and, the debt not being satisfied, filed a petition for adjudication of bankruptcy against her. She had no separate property :—

Held, that the married woman could not be adjudicated a bankrupt.

Per Mellish, L. J. :—Whether a married woman can be made a bankrupt if she has separate property—*Quære*,—*Ex parte Holland; In re Heneage*, L. R. 9 Ch., Ap. 307.

Page 94.—Add to notes to sect. 49.

It is competent to a non-assenting creditor under s. 126, of the English Bankrupt Act, 1869 (duly registered under s. 127), to sue for his original debt, where the debtor has failed to pay or tender the composition within the time agreed, or within a reasonable time.—*Edwards* v. *Coombe*, L. R. 7 C. P. 519.)

A judgment having been recovered against the defendant for a sum of money and remaining unsatisfied, the plaintiff applied to a judge at Chambers to commit the defendant to prison under the 5th section of the Debtors' Act, 1869. The judge made an order for the payment of the debt by monthly instalments. After three of such instalments had been paid, proceedings were taken by the defendant for the purpose of making a composition with his creditors under the 126th section of the Bankruptcy Act, 1869; and a resolution of the creditors was duly passed accepting a composition upon the defendant's debts, payable by two instalments. Default was made in the payment of the first instalment of the composition to the plaintiff, and instalments under the judge's order having by that time become due and not having been paid, the plaintiff applied again at Chambers for the committal of the defendant to prison for non-compliance with the judge's order :—*Held*, that the effect of the default in payment of the composition was to remit the plaintiff to the position he

occupied before the proceedings in respect of the composition took place, and that consequently, the order might be made for the defendant's committal to prison for non-compliance with the judge's order.—*Edwards* v. *Coombe*, Law Rep., 7 C. P. 519; and *Slater* v. *Jones*, Law Rep. 8 Ex. 186, discussed.

Newell v. *Van Praagh*, L. R. 9 C. P., 96.

And see *In Re Hatton*, L. R., 7 Ch. 723.

Page 105.—line 10 from bottom, for "*were*" read "*was*," and line 15 from bottom for "*were*" read "*was*."

Page 204.—Add to notes to sect. 133:

The protection given by the 92nd section of the *Bankruptcy Act*, 1869, (English Act) in cases of fraudulent preference to a purchaser, payee, or incumbrancer in good faith and for valuable consideration, extends to the creditor who is so preferred as well as to those claiming under him. If, therefore, a creditor for valuable consideration has no notice or suspicion that his debtor is in insolvent circumstances when the payment or transfer by way of fraudulent preference is made to him, he is protected. *Ex parte Butcher; In re Meldrum*, L. R. 9 Ch. Ap. 595.

TARIFF OF FEES.

(OF DECEMBER, 1864.)

For Insolvency proceedings in Ontario, promulgated by the Judges of the Superior Courts of Common Law, and of the Court of Chancery, under 27 and 28 Victoria, c. 17.

TARIFF.

Fees to solicitor or attorney, as between party and party, and also as between solicitor and client:—

Instructions for voluntary assignment by debtor, or for compulsory liquidation, or for petition, where the statute expressly requires a petition, or for brief, where matter is required to be argued by counsel, or is authorized by the judge to be argued by counsel, or for deeds, declarations, or proceedings on appeal	$2 00
Drawing and engrossing petitions, deeds, affidavits, notices, advertisements, declarations, and all other necessary documents or papers when not otherwise expressly provided for, per folio of 100 words or under	0 20
Making other copies when required, per folio	0 10
When more than *five* copies are required of any notice or other paper, five only to be charged for, unless the notice or paper is printed, and in that case printer's bill to be allowed in lieu of copies, drawing schedule, list, or notice of liabilities, per folio, when the number of creditors therein does not exceed twenty	0 20
When the number of creditors therein exceeds twenty, then for every folio of 100 words over twenty	0 10
Every common affidavit of service of papers, including attendance	0 50
Every common attendance	0 50
Every special attendance on judge	2 00
For every hour after the first	1 00

To be increased by the judge in his discretion.

Every special attendance at meetings of creditors, or before assignee, acting as arbitrator	$1 00
Fee on writ of attachment against estate and effects of insolvent, including attendance	2 00
Fees on rule of Court or order of judge	1 00
Fee on sub. ad test., including attendances	1 00
Fee on sub. duces tecum, including attendance	1 25
And, if above 4 folios, then for each additional folio, over such 4 folios	0 10
Fee on every other writ	1 00
Every necessary letter	0 50
Cost of preparing claims of creditor, and procuring same to be sworn to, and allowed at meeting of creditors, in ordinary cases, where no dispute	1 00
Costs of solicitor of petitioning creditor, for examining claims filed up to appointment of assignee, for each claim so examined	0 50
Cost of assignee's solicitor for examining each claim required by assignee to be examined	0 50
Preparing for publication advertisements required by the statute, including copies and all attendances in relation thereto	1 00
Preparing, engrossing, and procuring execution of bonds or other instruments of security	2 00
Mileage for the distance actually and necessarily travelled—per mile	0 10
Bill of Costs, engrossing, including copy for taxation, per folio.	0 20
Copy for the opposite party	0 50
Taxation of Costs	0 50

No allowance to be made for unnecessary documents or papers, or for unnecessary matter in necessary documents or papers, or for unnecessary length of proceedings of any kind. In case of any proceedings not provided for by this tariff, the charges to be the same, as for like proceedings, in the tariffs of the Superior Courts.

COUNSEL.

Fee on arguments, examinations, and advising proceedings, to be allowed and fixed by the judge as shall appear to him proper under the circumstances of the case.

FEE FUND.

Every warrant issued against estate and effects of insolvent debtors	$1 00
Every other warrant or writ	0 30
Every summary rule, order or fiat	0 30
Every meeting of creditors before judge	0 50
If more than an hour	1 00
If more than one on same day, $2, to be apportioned amongst all.	
Every affidavit administered before judge	0 20
Every certificate of proceedings by judge of County Court for transmission to a Superior Court or a judge thereof	0 50
Every bankrupt's certificate	1 00
Every taxation of costs	0 15

FEES TO CLERK.

Every Writ, or Rule, or Order	0 50
Filing every affidavit or proceeding	0 10
Swearing affidavit	0 20
Copies of all proceedings of which copy bespoken or required, per folio of 100 words	0 10
Every certificate	0 30
Taxing costs	0 50
Taxing costs and giving allocatur	0 65
For every sitting under commission, per day	1 00
If more than one on same day, $2, to be apportioned amongst all.	
Fee for keeping record of proceedings in each case	1 00
For any list of debtors proved at first meeting, (if made)	0 50
For any list of debtors at second meeting	0 50
Any search	0 20
A general search relating to one bankruptcy, or the bankruptcy of one person or firm	0 50

SHERIFF.

Same as on corresponding proceedings in Superior Courts.

WITNESSES.

Same as in Superior Courts.

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THE

INSOLVENT ACT OF 1875;

INCLUDING

FULL NOTES TO EACH SECTION,

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INDEX, AND LIST OF CASES.

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